

**SPORTING RULES IN EC LAW –
THE EXAMPLE OF THE FOOTBALL TRANSFER SYSTEM**

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PREFACE

I would like to dedicate this work to my dad without whose support I would have never got this far. Special thanks to my brother Thomas for his continuous moral support and extremely helpful advice and for never getting bored over discussing my thesis. I would also like to thank Dinusha, the best office mate ever. Finally, a big thank you to my supervisor Robert Lane for all the enjoyable conversations, advice and encouragement throughout the years.

I hereby declare that this thesis has been composed by myself, the work is my own and the work has not been submitted for any other degree or professional qualification.

ABSTRACT

More than thirty years after the European Court of Justice has confirmed that professional sport is covered by the Treaty, the application of EC law to sporting rules is still a matter of dispute. Apart from being a significant branch of business, professional sport also has special socio-cultural qualities, making it sit uneasily within the predominantly economically orientated Community law system.

This work examines the application of EC law to sporting measures, identifying the limits of Community intervention. In this context, special attention is paid to the sports bodies' legal autonomy. Furthermore, it is analysed to what extent the unique characteristics of sport warrant preferential treatment or even a reference to sport in the Treaty. On the basis of existing case law under Article 39 and 81 of the Treaty, a legal framework for dealing with sporting measures is developed, defining different categories of sporting rules under EC law. Thereby, the economic and social characteristics of sport are considered, examining how sporting interests may be taken into account under the Treaty. Subsequently, the suggested approach is tested on the example of the football transfer system, namely the 1997 and the 2005 FIFA transfer regulations.

Professional sport has particular characteristics that warrant special treatment under EC law. However, although the Community has finally recognised these sporting qualities, it has so far failed to provide a convincing legal basis to deal with sport accordingly. As a result, sporting rules have been treated on a case-by-case basis, leading to legal uncertainty. The suggested approach applies a sporting "rule of reason" under Articles 39(1) and 81(1), exempting measures that guarantee the proper functioning of sporting competition and/or protect sport's core values. As demonstrated in connection with the football transfer system, this approach ensures compliance with the Treaty whilst paying attention to sporting interests.

The example of sport illustrates that over the years EC law has found its way into areas of social and cultural interest it was originally not designed to deal with. Thus, the mainly economically orientated Community legislation is often lacking the required flexibility, a problem that for the time being may only be remedied by the Court. However, in the future involvement of the Member States may be needed for the Community to be able to take care of social issues appropriately.

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INTRODUCTION

The football transfer system, anti-doping legislation, nationality restrictions in team sports, selection rules for international tournaments – these are only a few examples of sporting measures that were challenged under EC law in recent years. However, although the European Court of Justice confirmed that professional sport is covered by the Treaty more than three decades ago, it was not until the infamous *Bosman*¹ judgment that the sporting community realised the full consequences of this verdict. Since then, EC law has found its way into many different areas of sporting life and in some cases gave rise to drastic rule changes, significantly altering the face of sport in Europe. Considering the extent to which European law has penetrated the sports business, not even the most fundamental sporting rules seem to be safe from Community intervention and many feel that the European Union endangers sport's core values. Thus, sports related decisions by the Court and Commission have often been met with heavy criticism by sports fans and officials.

The main reason behind the controversies surrounding the application of EC law to sport lies in its dual nature: unlike other economic activities, professional sport not only constitutes a significant branch of industry, but also has a very important social, cultural and educational dimension. Taking into account that the mainly economically motivated Community law leaves little room to pay attention to socio-cultural issues, tensions seem inevitable. Moreover, sports bodies are generally reluctant to accept outside regulation, believing that owing to their inside and expert knowledge, they are best suited to looking after their own affairs.

Thus, when the application of EC law to sporting rules is analysed, the two main questions arising are: Firstly, to what extent may sporting interests be taken into account under the EC Treaty and secondly, how far may sports bodies invoke their legal autonomy to escape Community intervention. Although the Court and Commission have offered some guidance on these questions in the past, they have so far failed to develop a consistent approach to sporting matters. Until now, issues have been solved on a case-by-case basis, making it very difficult to pre-judge the

¹ Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v. Bosman and Others* [1995] ECR I-4921.

outcome of pending cases. Still, it has to be welcomed that the Court has expressed its willingness to pay attention to sporting values and has shown a tendency to respect the sports bodies' legal autonomy to a certain extent. Having said that, the special treatment of the sports sector has regularly not been backed up with the necessary legal argumentation or – as has been the case in the Court of First Instance's decision in *Meca-Medina*² – the Court reaches the right decision, albeit following a debatable reasoning.

Thus, the main aim of this thesis lies in developing a consistent approach to sporting measures under EC law. In this context, the difficulties surrounding the application of EC law to professional sport shall be highlighted and the limits to Community intervention defined. On the other hand, it shall be outlined on the basis of existing case law and the Commission's decision-making practice under which circumstances and on which grounds sport requires special treatment and where preferential treatment is unwarranted. Subsequently, the developed approach is tested on the example of the football transfer system, namely the 1997 and the 2001/2005 FIFA transfer regulations.

Summarising, the thesis follows the structure set out below:

In the first chapter the economic relevance of the sports sector is highlighted, explaining why professional sport has attracted the attention of the Community in the first place. Then it is established that sport has certain socio-cultural functions in European society, which distinguish it from other economic activities. Having pointed out that these sporting qualities are worth protecting, the history of sport in EC law is outlined in order to gain an insight in the Community's approach to sporting matters.

Even though it is widely accepted that professional sport is principally covered by EC law, arguments for a Treaty exemption exist. Hence, the limits to the application of EC law to sporting rules are assessed, examining whether there are loopholes allowing sport a general or at least partial immunity from the Treaty. Thereby, special consideration is given to the question of the sports bodies'

² Case T-313/02 *Meca-Medina & Majcen v. Commission* [2004] 3 CMLR 60.

autonomy, in which context the scope of the human right of freedom of association is outlined.

Having analysed the special characteristics of sport and the limits to the application of the Treaty, the case for a reference to sport in the Treaty is presented. Thus, it is questioned whether the peculiarities of sport warrant an exemption from EC law. Then the option of including a protective reference to sport in the Treaty is assessed, before moving on to the new article on sport in the Constitution for Europe. Ultimately, alternative options to inserting a reference to sport in the Treaty are outlined.

The second chapter is dedicated to the football transfer system, explaining its purpose and historical development. Subsequently, the general application of the provisions on free movement to sporting rules is examined, followed by the special consideration of the post-*Bosman* transfer system. Analysing the Court's approach to sporting matters under Article 39(1) of the Treaty, it emerges that *Bosman* has introduced a sporting "rule of reason", which allows the consideration of sporting interests. While this has to be welcomed, it is submitted that the Court's case law concerning sporting measures lacks consistency, resulting in legal uncertainty. Thus, a more consistent approach to sporting rules under Article 39(1) is outlined, establishing different categories of sporting measures.

With regard to the personal scope of Article 39, the issue of nationality restrictions in European team sports is raised, taking into account the recent developments on the subject. Finally, it is explained why *Bosman* marked the start, rather than the end of Community intervention in the football transfer system. In this context, it is questioned whether the Commission's objections against the 1997 FIFA transfer regulations were in fact merited, critically analysing them under the provisions on the free movement of workers.

Sporting measures can not only constitute a restriction to free movement, but are suitable to distort competition. However, considering the special features of sport, the application of Article 81 to sporting rules poses various problems. Firstly, according to economic theory, professional team sports follow mechanisms different from usual market conditions, which has given rise to demands for a sporting exemption in EC competition law. Secondly, the strictly economically orientated

anti-trust law leaves little room to pay attention to sport's socio-cultural functions. Having said that, it is submitted that the Court's case law in *Wouters* may offer a solution to this conundrum. Thus, the effect of *Wouters* on the application of Article 81(1) to sporting measures is assessed; in particular, different categories of sporting rules are identified, trying to define a consistent approach to rules adopted by sports bodies under EC competition law.

Ultimately, the principles suggested above are applied to the post-*Bosman* transfer rules. Having given an overview of the different markets on which the product (football) may be sold, it is examined whether the 1997 transfer regulations posed a restriction on competition, also examining the possibility of an exemption under Article 81(3) of the Treaty. Thereby remaining restrictions for out-of contract players and regulations applying to players still in contract, which may distort competition in different manners, are differentiated. Additionally, it is briefly examined whether transfer rules may be caught by Article 82 of the Treaty.

In the last chapter, the 2001 compromise between the Commission and the footballing bodies on the transfer system is presented. Following that, the 2001 and 2005 transfer regulations are critically analysed under Article 39, as well as EC competition law, trying to establish whether they mark an end to the discussions surrounding the football transfer system in EC law.

1. THE APPLICATION OF EC LAW TO SPORT

1.1. IS SPORT DIFFERENT?

In the history of the European Union, few incidents have caused such a public outcry as the European Court of Justice's judgment in the *Bosman* case ten years ago¹. Whereas Community competence in "classical" economic matters such as agriculture, the internal market or fishery has always been more or less accepted, many EU-citizens found it hard to understand that the Court should be able to rule on sport - a subject that was not only traditionally thought of as non-economic, but also considered to fall under the jurisdiction of the autonomous sports bodies. As the following extract from *The Sun* demonstrates, many football supporters could simply not accept that the European Union should have the "right" to interfere with "the beautiful game":

"Once Luxembourg was a two-bob country only known for its radio station. And the fact that it once let in nine goals against England. Now a judge in the European Court in Luxembourg endangers our national game with his ruling that the transfer system is against European law. This euro madness will drive smaller clubs out of business or force them to merge. It will make football a paradise for players and agents – and hell for the fans. Who gave Europe the right to take football away from us?"².

More than ten years after *Bosman*, the application of EC law to sport is still a matter of dispute. Although the effects of *Bosman* have not destroyed football as many had feared and nowadays the majority of fans would not want to miss the possibility of new players from all over Europe being brought into their club "on a Bosman", the reluctance to accept Community intervention still exists. Only recently, the case of the Belgian club SC Charleroi, which is suing FIFA for damages after their star player Abdelmajid Oulmers, was injured whilst on international duty for Morocco, has once again fuelled the debate over the application of EC law to internal sporting

¹ Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v. Bosman and Others* [1995] ECR I-4921.

² *The Sun*, 21.9.1995, cited by Greenfield, S. & Osborn, G., "Contract and Control in the entertainment industry: dancing on the edge of heaven" (Ashgate Publishing, Aldershot, 1998), p. 22.

rules. Thus, one may wonder whether sport is indeed “different” from other areas of Community competence, hence requiring favourable treatment or whether its claim to special legal status is without substance. However, before assessing the limits to the application of EC law to sporting rules, it is necessary to determine on which grounds sport is considered to fall under the scope of the Treaty in the first place.

1.1.1. Community Competence in Sporting Matters

When analysing the Treaty, one notices that there is no explicit provision which would enable the Community to act on sporting matters³. As it is an important principle in EC law that Community activity is limited to the powers conferred upon it by the Treaty⁴, sport falls under the scope of EC law only in so far as there is a legal basis for Community competence in the Treaty. The provision empowering the Community to rule on sporting issues can be found in Article 2 of the Treaty, which states that “the Community shall have as its task [...] to promote throughout the Community a harmonious, balanced and sustainable development of economic activities”. Thereby included is the establishment of an internal market⁵ and of a system ensuring that competition in the internal market is not distorted⁶. Thus, as far as sport may be considered as an economic activity in the sense of Article 2 of the Treaty, the Community may implement and apply legislation intended to regulate the economic side of sport.

A prime example for the economic relevance and ongoing commercialisation of professional sport is the explosion in value of broadcasting rights within the last few decades: whereas broadcasters paid approximately £ 53 million for the Olympic Games in Moscow 1980, the rights to the 1992 games in Barcelona were sold for £ 337 million, augmenting to a value of £ 793 million for the transmission of the 2004 Olympic Games in Athens⁷. In Europe, the commercialisation of sport is most prominent in football, where the German Kirch Media Group bought the television

³ However, it should be noted that the Treaty establishing a Constitution for Europe, signed on 29 October 2004 in Rome, includes a reference to sport, OJ 2004 C 310/1.

⁴ EC Treaty, Article 5.

⁵ EC Treaty, Article 3(1)(a).

⁶ EC Treaty, Article 3(1)(g).

⁷ Source: http://www.olympic.org/uk/organisation/facts/revenue/broadcast_uk.asp.

rights for the World Cups in 2002 and 2006 for an equivalent of £ 1.5 billion⁸, only famously to file for insolvency shortly after. On a national level, the British broadcasting company BSkyB has secured a deal with the English Premier league worth £ 1 billion, lasting for three seasons as from season 2004/05⁹, while the Scottish Premier League has accepted a £ 32 million offer from Irish satellite company Setanta for the live broadcasting rights for the seasons 2004/05 to 2007/08¹⁰.

The economic dimension of football is underlined by the fact that nowadays clubs are professionally run businesses earning enormous sums from selling merchandise¹¹ and are even featuring on the stock market¹². The professional services firm Deloitte & Touche estimate in their 2003 Annual Review of Football Finance that the turnover of English First Division/Premiership clubs had increased seven-fold in ten years to £ 1.132 million in 2001/02. However, as the respective figures for 2003/04 show, it appears that the growth rate is slowing down (the revenue achieved by Premiership clubs in 2003/04 totalled to £ 1,326, up 6% on 2002/03 (£ 1,246), which signifies the lowest rate of growth since the Premiership's foundation). On a European level, the aggregated income of the "big five" European Leagues (England, Italy, Spain, Germany and France) was said to be € 5.8 billion in 2003/04, with the Premiership being top of the league, generating revenues of nearly € 2 billion, followed by the Italian Serie A with revenues of € 823 million less. According to Deloitte & Touche's rich list for 2003/04, the world's wealthiest football team, Manchester United, generated revenues of € 248 million, ahead of Real Madrid (€ 226 million), AC Milan (€ 212 million) and Chelsea FC (€ 208 million). Compared to season 2002/03, where Manchester United was not only the most profitable football club with a £ 175 million turnover and operating profits of £ 34 million, but the richest team of any sport in the world, followed by the

⁸ Source: <http://www.news.bbc.co.uk>, "World Cup TV will be free", 26.2.2001.

⁹ Source: Holland, P., "Sky won't sub-licence Prem TV deal", www.soccernet.com, 12.5.2004.

¹⁰ Source: "SPL agree £ 32m Setanta TV deal", www.soccernet.com, 26.2.2004.

¹¹ According to the Deloitte & Touche 2003 Annual Report on Football Finance, English clubs generated £ 90 million from merchandising in 2002/03.

¹² As, for example, Borussia Dortmund or Juventus Turin; however, this leaves clubs open to the risk of take-overs, as the example of Malcolm Glazier, who after his take-over of Manchester United has now taken the club off the stock market, shows.

US Baseball team New York Yankees with revenue of £ 170 million, Manchester United achieved a record operating profit of £ 51.7 million in 2003/04.

Sports such as football are an important tool in the advertising industry that enables companies to develop a high profile, positive image by sponsoring a big club¹³ or by using famous sport stars to promote their products. Thus, the last few years have witnessed the incorporation of sponsors' brands in stadium names, such as the Hamburger SV's AOL Arena, Leicester's Walkers Stadium or the curiously named Playmobil Stadium of the German 2. Bundesliga club Greuter Fürth¹⁴. In Austria, where sponsoring is arguably most prominent in Europe, the Bundesliga club FC Pasching has even sacrificed its team name for a sponsorship deal and is now called FC Superfund, whereas the 2. Bundesliga club Untersiebenbrunn has changed its name to SC Interwetten.com, only to be told at the beginning of season 2003/04 that Interwetten.com does not intend to continue its sponsorship. Similarly, the example of Red Bull owner Dietmar Mateschitz who, after taking over his hometown's club Austria Salzburg, has not only changed its name into Red Bull Salzburg, but has also made the club abandon its traditional colours, shows that on an increasing number of occasions economic considerations precede the fans' interest.

Considering the numbers on transfer spending in the last few years, the Commission's concerns about the football transfer system are hardly surprising¹⁵. According to Deloitte & Touche, in the 2000/01 season English clubs spent a record £ 423 million on transfer fees, a level which will most probably never be reached again, owing to the introduction of a new transfer system. However, after a substantial fall in 2002/03 (from £ 407 million in 2001/02 to £ 203 million), the gross transfer expenditure has bounced up again to £ 414 million in 2003/04, which

¹³ Manchester United, for example, have secured a £ 36 million four year shirt sponsorship deal with Vodafone as from 1 June 2004, source: <http://news.bbc.co.uk/1/hi/business/3252120.stm>, and a £ 303 million 13 year deal with Nike, source: <http://news.bbc.co.uk/1/hi/business/3151028.stm>.

¹⁴ However, when it comes to bizarrely named stadiums, surely non-league side Witton Albion, whose Wincham Park was called The Bargain Booze Stadium for a few seasons, is top of the league. On a more serious note, one may also wonder about Arsenal's decision to accept £ 100 million for naming their new stadium the Emirates Stadium, "even though the word Emirates relates to a land far off and for the past few years has been associated with London rivals Chelsea", see Hadsley, N., "Named and Shamed", *When Saturday Comes*, December 2004, Issue 214, p. 20.

¹⁵ One only has to remember the £ 48 million world record move of Zinedine Zidane from Juventus to Real Madrid in 2001, the £ 37 million transfer of Luís Figo from Barcelona to Real Madrid in 2000 or the 2002 UK record transfer fee of £ 29 million Manchester United paid Leeds United for defender Rio Ferdinand.

according to Deloitte & Touche is largely due to Chelsea's transfer spending of £ 175 million.

1.1.2. The Special Qualities of Sport

Having demonstrated the huge economic potential of the sports industry in general and football in particular, one would have thought that it is impossible to deny that sport is an economic activity in the sense of Article 2 and as such falls under the scope of the Treaty. The reason why there are still controversies about the application of Community law to sport, is its hybrid nature: unlike many other economic activities, professional sport is not only big business, but has also a very important social dimension. Before trying to analyse the "other" side of sport, though, it seems appropriate to determine what the notion of sport actually means. The only official definition of sport is to be found in Article 2(1)(a) of the Council of Europe's European Sports Charter, which defines sport as

"all forms of physical activity which, through casual or organised participation, aim at expressing or improving physical fitness and mental well-being, forming social relationships or obtaining results in competition at all levels"¹⁶.

Taking into account this definition, it is possible to define different functions that sport performs in our society:¹⁷

1.1.2.1. Educational Function of Sport

Sport is widely considered to be an important instrument of education based on ethics of fair play, equal opportunities and reward for sporting merit. Active participation in sport is thought to promote a balanced personal development by helping young people to develop better social skills and show them how to fit into society. Those who have practised sport have developed a fighting spirit and a capacity for sacrifice, as well as self-respect and respect for others: all qualities which build a person's character and help him or her to progress through life. Sport is also an excellent way to teach young people positive values such as determination,

¹⁶ The full text of the Charter is available at <https://wcm.coe.int/ViewDoc.jsp?id=206451&Lang=en>.

¹⁷ See also "The development and prospects for Community action in the field of sport", Commission Staff Working Paper, DG X, Brussels, 29.9.1998, http://www.europa.eu.int/comm/sport/doc/ecom/doc_evol_en.pdf.

courage, tolerance, loyalty, friendship and team spirit¹⁸. The important role that sport plays in education is emphasised by its popularity, illustrated by the fact that of the young people who are members of an association, 54 percent of them have joined a sports association¹⁹.

However, talented young sports people are increasingly manipulated for economic purposes, which makes it necessary to introduce measures to safeguard their well-being and provide them with proper education and training. The European Union has recognised the potential of sport as a means of educating young people and declared 2004 as the Year of Education through Sport²⁰.

1.1.2.2. Public Health Function

Without doubt, physical activity is one of the best ways to improve one's health. Practising sport on a regular basis is an effective means to prevent certain illnesses such as heart disease and cancer and can help to maintain good health and quality of life among the elderly. Sport not only supports the physical well-being of a person, but also improves mental health and can be used in the fight against depression. Moreover, sport is of fundamental significance for combating smoking and alcohol as well as drug abuse, which makes it even more important to support the sports associations in their attempts to eradicate doping in sport.

1.1.2.3. Integrationist Function

Sport is a way to forge links between people from different parts of the world or different walks of life²¹. It can also have a role to play in the binding of emerging nations and indeed international organisations. The European Union recognised this integrationist quality of sport early on, trying to use it to promote the idea of a

¹⁸ Thus, in the Eurobarometer survey "Citizens of the European Union and sport", conducted in Autumn 2004 in the 25 Member States, 52 percent of persons asked were of the opinion that sport develops team spirit, followed by discipline (46 percent), friendship (38 percent) and effort (36 percent).

¹⁹ See the "The European Model of Sport" - Discussion paper for the Working Group, 1st European Conference on Sport, Olympia, 22.5.1999, available at www.europa.eu.int/comm/sport/action_sports/dialogue/assises1999/assises_base_model_en.pdf.

²⁰ Decision 291/2003/EC of the European Parliament and of the Council of 6 February 2003 establishing the European Year of Education through Sport 2004, OJ 2003 L 43/1.

²¹ According to the already mentioned Eurobarometer survey, close to three in four European Union citizens (73 percent) view sport as a means of promoting the integration of immigrant populations by developing a dialogue between different cultures.

European identity²². The fact that sports not only brings people together on the playing field, but is also a major impetus for European integration is probably best illustrated by the Ryder Cup, on the occasion of which fans all over Europe cheer on a European golf team taking on a US selection. Not many occasions come to mind where citizens in the different Member States develop a sense of being European, as it regularly is the case when the Europeans win against their American opponents, with thousands supporting a European, rather than a German or French team. Besides, taking into account the enlargement of the European Union, sport as an activity that is overcoming national boundaries can help to build bridges between the old and the new Member States and accelerate European integration.

1.1.2.4. Cultural Function

When thinking of culture, sport might not be the first activity that springs to mind. Taking into account that more than half of the citizens in the European Union are actively practising sport on an amateur level²³ and even more are following the coverage of professional sports, it becomes evident that sport plays a very important role in everyday life. One can think of very few other subjects that feature as prominently in television or newspapers and can instantly change programme schedules in a way that only a major crisis or disaster would. Even those who are not interested in sport or are hostile to it, “cannot escape its nagging presence, as an ongoing part of the background noise of contemporary culture”²⁴. The cultural effect of sport can also be observed whenever a major international sporting competition such as the FIFA²⁵ World Cup or the Olympic Games takes place, where people from around the world come together to support their teams²⁶. Sport strengthens national

²² See for example the 1985 Adonnino Report, whose recommendations were adopted at the 1985 Milan European Council, “A People’s Europe”, (1985) 6 Bulletin of the European Communities, Suppl. 7/85.

²³ “Report from the Commission to the European Council with a view to safeguard current sport structures and maintaining the social function of sport within the Community framework”, hereinafter referred to as the “Helsinki Report on Sport”, Brussels, 10.12.1999, COM (1999) 644 final, p.3.

²⁴ Blake, A., *The Body Language: The Meaning of Modern Sport* (Lawrence & Wishart, London, 1996), p. 11.

²⁵ Fédération Internationale de Football Association, being the international regulatory body of football.

²⁶ For example, a total of 1,165,192 people followed the games in the ten stadiums around Portugal during the 2004 UEFA European Championships, source: <http://www.euro2004.com/News/Kind=1/newsId=205918.html>.

or regional identity by giving people a sense of belonging to a group and offers them the opportunity to put down roots. Although sport might not be as intellectually stimulating as literature, art or music, it features prominently in many areas of our society and its cultural significance cannot be denied.

1.1.2.5. Social Function

Probably the most important feature of sport in a non-economical context is its social dimension. Sport has an impact on modern society in various ways: firstly it is an excellent tool to integrate the physically or mentally disabled and promote their individual talents. Moreover, sport can be used to help young people from less favourable backgrounds and bring those who have lost their way back into society. Sport is one of the sectors most likely to generate employment for young people and, as such is mentioned in the Commission report on local development and employment initiatives²⁷. Apart from that, it encourages people from different backgrounds to interact socially with each other and form relationships. The image of teams with players from different racial backgrounds and origins can also help to combat racism and xenophobia, as the example of the French national team in the World Cup 1998 shows²⁸. Another feature of sport that cannot be underestimated is its function as a stress relief for many people, in so far as it works as a catalyst for aggression.

1.1.2.6. Recreational Function

Other than the above-mentioned social, educational and cultural benefits of sporting activity, sport is simply an important leisure occupation that provides entertainment for millions of people throughout Europe²⁹. Not only is it the favourite pastime for lots of amateur athletes, but it offers recreation to many more who follow professional sport in their spare time. Sport definitely is one of the favourite leisure

²⁷ "First Report on Local Development and Employment Initiatives", DG V, Publications Office, ISBN 92-828-1751-2.

²⁸ Although world peace might not be achieved through sport, its symbolic value should not be underestimated. This has recently been demonstrated by the example of Bnei Sakhnin, who won the 2004 Israeli Cup Final and is the first team made up of Israeli Arabs and Jewish Israelis represented in the UEFA Cup.

²⁹ According to the 2004 Eurobarometer survey, 38 percent of the people asked declared they practise a sport at least once a week.

activities of the European population and considering the positive values of sport, it would be important to encourage even more people to take up a sporting activity.

1.1.3. Professional Sport

Having analysed the different functions of sport, it seems as if its special features, such as the educational, social and health benefits, mainly apply to amateur sport. However, amateur sport and its positive impact on society are very much influenced by the professional sector. It is a well known phenomenon, for example, that professional sportsmen and sportswomen act as role models and that the success of a certain team or the occurrence of a special sporting event such as the FIFA World Cup or Wimbledon motivates especially younger people to start practising a particular sport. Besides, professional sport itself carries most of the depicted sporting values, demonstrating team spirit, determination and understanding between different races and cultures on a higher stage. What is even more important is the fact that in sports such as football, the associations, apart from being involved in the economic side of the sport, also fulfil a public task by redistributing funds from the professional clubs to the grassroots sector, helping to keep youth and amateur sport alive³⁰.

Thus, when the application of EC law to sport is assessed, it is necessary to understand the role that sports plays in our society and the huge importance it has for millions of people in Europe, who follow “their” team every day of their lives, often from a very early age. The special nature of sport as an activity that is not only of enormous economic potential, but also has a considerable social significance, differentiates it from other economic sectors. Sport operates in an independent and non-governmental environment and to apply the mainly economically motivated Community law may risk the socio-cultural and integrationist qualities of sport.

³⁰ For example, UEFA has announced that it will invest over £ 160 million of income generated by the European Championships in the grassroots sector, see UEFA press release “Euro 2004 benefits grassroots”, 22.6.04; furthermore, UEFA has established a disability football panel in order to investigate the possibilities of promoting football for the disabled, see UEFA press release “Football for all”, 11.2.2004 and launched a new grassroots programme to increase the mass participation of football in Europe, see UEFA press release “Grassroots programme starts”, 4.7.2003.

Once the need to protect the special characteristics of sport is principally recognised, the next step is to assess in what way and to what extent such considerations may be taken into account under the Treaty. To understand the Community's approach to sporting matters, however, it is necessary to outline the historical development of the European Union's relationship with the sports sector.

1.2. THE HISTORY OF SPORT IN EC LAW

In view of the current debates surrounding the Community's role in sporting matters, it may surprise that when the Court confirmed the application of EC law to sport thirty years ago, the decision went more or less unnoticed. In the initial stages of the European Community, sport played a negligible role on the EC's agenda and it was only in the last decade that European law started to have a major impact on professional sport. Although grand-scale Community intervention has certainly been initiated by the decision in *Bosman*, it is mainly the ongoing commercialisation of professional sport which has attracted the attention of the European Union.

1.2.1. Community Activity before *Bosman*

The reason for the lack of Community activity in sport before *Bosman* lies primarily in the fact that for decades the main focus within the European Community had clearly been on economic, rather than social, matters and sport had been considered to be the latter. Although social progress and the improvement of living conditions are mentioned in the EC Treaty's preamble and Article 2, for many years the first and foremost goal of the Member States had been economic integration. Thus, social issues would usually only be tackled if they were considered to form an obstacle to the realisation of a common market³¹, an attitude that only changed in the nineties, when the balance slowly shifted in favour of socio-political integration.

1.2.1.1. The Judgments in *Walrave* and *Donà*

With regard to the sports sector, it seems as if sporting activity simply was not judged to be an area that interfered with the aims of the Treaty and consequently did not demand any Community action. Moreover, sport was widely treated as an autonomous sector that was best left to generate its own internal rules, which is why Community intervention was considered to be unnecessary. Eventually, the matter of European law in sport was brought before the European Court of Justice by two

³¹ A typical example is the issue of equality between men and women, which was only included in the Treaty owing to concerns that Member States with stricter equality laws would be at a competitive disadvantage, rather than to protect women in the labour market.

Dutch sportsmen in 1974 and although the Court's verdict should have put the world of sport on high alert, the judgment was more or less ignored by sport's organisations, as well as the Community itself.

In *Walrave and Koch v. Union Cycliste Internationale*³², two pacemakers in motor-paced cycling challenged a rule introduced by the sport's governing body that required the pacer and the cyclist in a team to be of the same nationality in order to be allowed to compete in the World Championships. As both of them acted as pacers for non-Dutch cyclists, they felt that they were impeded in their right to free movement. Upon a reference from the Arrondissementsrechtbank Utrecht, the European Court of Justice held that: "having regard to the objects of the Community, the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty"³³ and added that any discrimination based on nationality was prohibited under Article 48 (now 39), as long as it referred to an activity which had the character of gainful employment. However, the Court continued that nationality discrimination may be permitted in sport teams and particularly in national teams, "the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity"³⁴, suggesting that such a case would not be covered by EC law at all³⁵. In the case at hand, the Court left it to the national court to decide whether the pacer and the cyclist did or did not constitute a national team.

The second occasion on which the Court had the chance to rule on a sports related case involved nationality-based restrictions in the organisation of Italian club football. In *Donà v. Mantero*³⁶, Mr Mantero, Chairman of the Rovigo Football Club, had entrusted Mr Donà to undertake scouting duties abroad to find players for his team. After Mr Donà had placed an advert in a Belgian newspaper looking for players, Mr Mantero refused to reimburse his expenses on the grounds that, according to the rules of the Italian Football Association, effectively only Italian nationals were allowed to participate in games and claimed that Mr Donà had acted prematurely and should have waited for the end of the ban on foreign players. Mr

³² Case 36/74 *Walrave and Koch v. Union Cycliste Internationale* [1974] ECR 1405.

³³ *Ibid*, at para 4.

³⁴ *Ibid*, at para 8.

³⁵ See also AG Lenz in *Bosman*, at para 215.

³⁶ Case 13/76 *Gaetano Donà v. Mario Mantero* [1976] ECR 1333.

Donà replied that the provisions in question were invalid as they infringed the right of free movement. The Court affirmed its judgment in *Walrave* and held that discriminatory nationality rules in sport were incompatible with EC law, unless they concerned certain matches and foreign players were excluded for sporting reasons relating to the particular nature and context of such matches³⁷. Having said that, the Court once again entrusted the referring national court to make the final decision, asking it to determine the nature of the matches at issue³⁸.

1.2.1.2. Commission and European Parliament

Although the Court had clearly stated in both judgments that sport, when exercised professionally, fell under the scope of the Treaty and that discriminatory practices in sport were to be abolished, the other Community institutions took little notice. The Commission, for example, started negotiations with UEFA over nationality restrictions in European club football in 1978, two years after the decision in *Donà*. However, it took 13 years to conclude a non-binding “gentleman’s agreement”, introducing the “3+2” rule, a system that still put a limit on the number of foreigners, allowing three non-nationals plus two “assimilated”³⁹ players on the pitch at a time. It seems very peculiar to say the least, that after years of negotiations, the Commission still allowed UEFA to keep nationality restrictions, completely ignoring the Court’s previous judgments on the matter. It can only be assumed that the European Commission simply did not consider professional football as a significant economic activity; or, more likely, it was apprehensive of rocking the boat, of changing a well-established system and risking public outrage throughout Europe.

The European Parliament in the meantime, tackled sporting matters in a few reports on issues such as sport and violence during the mid-eighties, namely the Van Raay Report⁴⁰, which criticised restrictive practises in sport. Other Community activity was restricted to the 1985 Adonnino Report, adopted at the Milan Summit, that linked sport to the concept of a “People’s Europe”, recognising its integrative character throughout Europe.

³⁷ *Ibid*, at para 14.

³⁸ *Ibid*, at para 16.

³⁹ Players who had played in the country in question for five years without interruption, including three years in junior teams.

⁴⁰ Report produced by the Committee on Legal Affairs and Citizens' Rights, A2-415/88.

The rapid commercialisation of sport in the nineties, combined with a desire within the Community to shift the balance from economic to socio-political integration, caused a change in the Community's policy. The Commission, in particular, started to pay more attention to sports issues, and brought out the 1991 paper "The European Community and Sport"⁴¹, in which it stated its willingness to apply Community law to the field of sport. For the first time, the Commission defined its overall approach to sports, emphasising the importance of a co-operative approach to sports policy. The adoption of this communication eventually led to the creation of the European Sports Forum, which provided a genuine floor for a permanent dialogue between the Commission and sports associates and has helped to improve relations.

At approximately the same time, the European Parliament too, addressed the issue of sport with a resolution on the European Community and sport⁴², a reaction to the so-called "Larive Report" by the Committee on Culture, Youth, Education and the Media⁴³. While it was acknowledged that the rules and activities of sports associations had to comply with Community law, the Parliament put a special emphasis on the social and cultural relevance of sport in the European Union.

1.2.2. *Bosman* and Beyond

Although there had been repeated signals that the Community intended to take sporting matters more seriously and EC law would be applied to sport when practised as an economic activity, *Bosman* came as a nasty and unexpected shock to most people in the world of sport. Especially the football governing bodies were completely unprepared for the effects of the decision, as they had remained confident that "the judgment would go with football, not with *Bosman*"⁴⁴. Despite the fact that the decision was hardly surprising from a legal point of view (in particular as it went along with Advocate General Lenz's opinion delivered three months earlier), there

⁴¹ "The European Community and Sport", Commission communication of 31.7.91, SEC(91) 1438.

⁴² "EP Resolution on the European Community and Sport", A3-0326/94, OJ C 205/486, 25.7.94.

⁴³ "EP Report on the European Community and Sport", A3-0326/94, 27.4.94 (Part A) and 29.4.94 (Part B).

⁴⁴ See Will, D., "The Federation's Viewpoint on the New Transfer Rules" in Jeanrenaud, C. & Késenne, S. (eds) *Competition in European Sports after the Bosman Case: Competition Policy in Professional Sports* (Standaard, Antwerp, 1999), p. 9, who explains that FIFA and UEFA were "caught out" by the judgment, adding that it "did come as something of a bomb-shell [sic] to us and practically overnight we had to start re-thinking the future of football in Europe".

are very few cases in the Court's history that have attracted as much media interest and dispute throughout Europe as *Bosman*.

The facts of the case are now well known, but deserve, owing to the judgment's importance, recapitulation: Mr. Jean-Marc Bosman was a middle-of-the-road Belgian football player who had been employed by the Belgian first division club SA Royal Club Liègeois⁴⁵. In 1990, the club offered him a new one-year contract at a quarter of his previous salary, which Bosman refused to sign, with the effect that he was put on the transfer list. The transfer rules of the Belgian football association provided, in compliance with the UEFA guidelines, for a system where, every time a player moved to a new club, his previous club was entitled to a transfer fee. This transfer payment was calculated on the basis of the player's age and salary and was due irrespective of the fact that the player's contract had already expired. In SA d'économie mixte sportive de l'Union Sportive du Littoral de Dunkerque⁴⁶, a French second division club, Bosman found a club that was willing to pay the agreed transfer fee, but RC Liège refused to release the player, doubting the French club's solvency. Since there was no interest from any other club and Bosman's contract with his old club had run out, he was not allowed to play during the 1990/91 season. As a consequence, Bosman started legal proceedings in the Belgian courts, claiming the rules governing the transfer system violated Articles 48, 85 and 86 (now 39, 81 and 82) of the Treaty.

The matter ultimately reached the European Court of Justice which, in line with its previous judgments on the matter, reaffirmed that sport fell under the scope of EC law when practised professionally. It then continued to hold the requirement of a transfer fee after a player's contract has been terminated to be in conflict with the rules on the free movement of workers, albeit not tackling the question of competition law. With regard to the other issue raised by Bosman during the proceedings, the nationality restrictions of the "3+2" system, which had previously been agreed with the Commission, the Court decided that this also infringed Community law.

⁴⁵ Hereinafter referred to as RC Liège.

⁴⁶ Hereinafter referred to as US Dunkerque.

Of all the different sporting bodies, the football associations were particularly aggrieved that Community law was interfering with what they perceived to be their own affairs, to be regulated only by themselves. As Keith Cooper, director of communications for FIFA put it: “Football has always been remarkably successful at looking after its own affairs. It is difficult to understand why regulatory authorities feel they now have to become involved”⁴⁷. The controversy around the *Bosman* case perhaps highlights the fact that the majority of European citizens had no problem with classical economic issues such as agriculture and trade of goods falling under Community competence, but found it difficult to accept that a decision of the European Court of Justice had the power to change the face of European football forever.

1.2.2.1. The Amsterdam Declaration on Sport

As a result of the shock delivered by *Bosman* and the belief that sport was, owing to its social importance, not a business like any other, many urged that sport should be given a legal base in the Treaty. The European Parliament in particular, took an interest in the matter and the Committee on Culture, Youth, Education and the Media drew up a report on the role of the European Union in the field of sport⁴⁸. The so-called “Pack-Report”, named after its German rapporteur, and the following debate in Parliament emphasised the cultural, social and educational dimension of sport and stated the need to recognise its specific nature within the European Union. In order to honour the special status of sport and to create a legal base to include sport in the budget, the Parliament called upon the Intergovernmental Conference launched in March 1996 to include an explicit reference to sport in the revised Treaty.

However, despite the Parliament’s endeavours and the lobbying by different sports organisations who had hoped to set aside the effects of the *Bosman* judgment⁴⁹, sport merely appeared in the Amsterdam Treaty in the form of a non-binding declaration. It seems that the main reason for not incorporating an article on

⁴⁷ *Financial Times*, 23.1.1998, p.2.

⁴⁸ Report on the Role of the European Union in the Field of Sport, (Pack Report), A4-0197/97, 28.5.1997.

⁴⁹ See for example the statement of Marlis Rydzy-Götz, Secretary General of the European Non-Governmental Sports Organisations (ENGSO) at the public hearing “The EP - A sounding board for Europe’s citizens” to express concerns and expectations in view of the Intergovernmental Conference 1996, available at www.europarl.eu.int/hearings/igc2/doc22_en.htm.

sport into the Treaty was concerns that this would open the door for other professions demanding an exemption, a situation that the Member States wanted to avoid at all costs. The declaration read:

“The conference emphasises the social significance of sport, in particular its role in forging identity and bringing people together. The conference therefore calls on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue. In this connection, special consideration should be given to the particular characteristics of amateur sport.”

Although the declaration does not grant the Community the competence to legislate on sporting matters, it acknowledges the socio-cultural and integrative qualities of sport and urges all European institutions to take sporting interests into consideration when acting upon other issues. Despite the fact that the Declaration seems “fairly banal”⁵⁰ and is non-binding, it put sport firmly on the European Union’s agenda. The Amsterdam Declaration represented the Member States’ first serious response to *Bosman* and far from being an unimportant piece of “soft law”, it has proved highly significant in the development of a more broad-based approach to sport in the EU.

This is underlined by the fact that since the Amsterdam Declaration, each Council Presidency has discussed sport in some form. While the Luxembourg Presidency (July – December 1997) and the British Presidency (January – June 1998) tackled sport in conjunction with employment issues, the Austrian Presidency (July – December 1998) examined the question of sport on a broader basis, analysing the social role of sport and its status in the EU. On this occasion, the European Council expressed the view that the social function of sport could only be served through the current pyramid structures of international sports federations with monopoly regulatory power. The Vienna Council identified the need to protect those structures against threats stemming from the ongoing commercialisation of sport, and asked the Commission to “submit a report to the Helsinki European Council with a view to

⁵⁰ Henry, I. & Matthews, N., “Sport, Policy and the European Union: the Post-Maastricht Agenda“, (1998) 3(1) Managing Leisure, p. 9.

safeguarding current sports structures and maintaining the social function of sport within the Community framework”⁵¹.

With this request, the Member States reaffirmed their approach to sporting matters laid down in the Amsterdam Declaration and emphasised that sport should also be tackled from a social, rather than a purely regulatory angle. In addition to the issue of the status of sport in Community law, the Austrian Presidency Conclusions were also significant for the beginning of an EU policy to combat doping in sport.

1.2.2.2. A New Approach to Sport?

In 1998, as response to the Amsterdam Declaration, the Commission published the staff working paper “The Development and Prospects for Community Action in the field of Sport”⁵², drawn up by the Education and Culture Directorate, which has since become a key institution in developing the European Union’s sports policy. The paper acknowledged that Community action in the field of sport had not been following a co-ordinated strategy and intended to provide a framework for EU involvement in sport. The Commission initially emphasised the socio-cultural and integrative qualities of sport, but continued to stress its enormous economic potential and the danger caused by the commercialisation of sport. In this context, the paper reviewed the application of the Treaty to sport and called for Union action in areas such as sports broadcasting rights and competition policy. In order to deal with the two different faces of sport, a dual approach was suggested: while ensuring the implementation of EC law as far as the economic side of sport was concerned, the Community should try to integrate sports in different EU policies at the same time.

Shortly after the working paper, DG X (as it then was) brought out the consultation document “The European Model of Sport”⁵³, analysing the traditional pyramid structure of sports federations and emphasising the unique features of European sport. Again, the important social role of sport was pointed out, but the

⁵¹ Austrian Presidency Conclusions, 11. and 12. December 1998, at para 95, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00300-R1.EN8.htm.

⁵² “The development and prospects for Community action in the field of sport”, European Commission, DG X, Brussels, 29.9.1998, available at http://www.europa.eu.int/comm/sport/doc/ecom/doc_evol_en.pdf; for a more detailed analysis see Parrish, R., “The Development and Prospects for Community Action in Sport”, SLB (1998) 1(6), p.12.

⁵³ “The European Model of Sport”, European Commission, DG X, November 1998, available at http://www.europa.eu.int/comm/sport/doc/ecom/doc_consult_en.pdf.

Commission also identified problematic issues such as the collective marketing of sports broadcasting rights and above all stressed the need to distribute money among clubs in Europe to guarantee a financial and sporting balance. In contrast to the situation in the US, European club sport was described to be governed by a system of promotion and relegation, supported by financial solidarity between the different levels. Attached to the consultation document was a questionnaire on the subject of the structure of European sport and the relationship between sport and television, the findings of which were used by the Commission to prepare the first Conference on Sport held in Assises, Greece in May 1999. In organising this conference, the Commission responded to the suggestion in the Amsterdam Declaration on Sport to give sports organisations a hearing before making any important decisions affecting sport and assembled the principal actors in European sport to discuss future developments. The participants in the conference urged the Union to respect the autonomy of sports organisations when applying Community law and emphasised the value of such organisations in developing the youth and grassroots sector⁵⁴.

1.2.2.3. Involvement of the Member States

Shortly after the Assises Conference, the Sports Ministers of the EU held an informal meeting in Paderborn, Germany, where, amongst other things, the application of Community law to sporting matters was discussed. Thereby, the European Commission was invited to set up a working group composed of representatives of the Member States and of the Commission, which should tackle the question of how the concerns of sport could be taken into account under the Treaty⁵⁵. The German Presidency Conclusions also suggested that the working group should establish a dialogue with sports organisations, underlining the fact that the Member States wanted to see sports policy on an EU level to develop in a more broad-based direction. However, although the Sports Ministers made clear that the relationship between sport and EC law should be clarified in order to ensure the preservation of the special characteristics of sport, they did not come forward with a suggestion as to

⁵⁴ Conclusions of the first European Union Conference on Sport, Assises, Greece, May 1999, available at http://www.europa.eu.int/comm/sport/doc/ecom/assises_conclusions_en.pdf.

⁵⁵ Conclusions of the German European Council Presidency on the occasion of the informal meeting of the sports ministers of the European Union, 31.5.-2.6.1999 - "The Paderborn Conclusions", available at http://www.europa.eu.int/comm/sport/doc/infor_meet/paderborn_en.pdf.

how this should be achieved and left it to the Commission to propose such measures. Apart from that, the Ministers were demanding more Community action in the fight against doping in sport and also touched upon sport and employment as well as the issue of improving the portrayal of sport for the disabled in the media.

The social approach to sport was significantly widened during the Finnish Presidency in the second half of 1999. In a meeting of the EU Sports Directors (these are the directors responsible for sports issues in the government offices of the Member States) the discussion on the social and cultural values of sport continued, highlighting the employment creating effect of sport, its impact on European youth culture and the contribution of sport to health⁵⁶. More significant than the meeting of the Sports Directors, though, was the presentation of the Commission's "Helsinki Report on Sport"⁵⁷ to the Helsinki European Council in December 1999.

1.2.2.4. The Helsinki Report on Sport

The Helsinki Report on Sport was the result of a widespread consultation process between the Commission and various sports organisations, most notably including the results of the First EU Conference on Sport in Assises. The Commission acknowledged the social, educational and cultural function of sport and pointed out that these values had themselves come under threat as sport had become more and more commercially valuable. As the Treaty contains no specific provisions on sport, it was noted "there can be no question of large-scale intervention or support programmes or even of the implementation of a Community sports policy". However, the Commission emphasised that the sporting sector was subject to the application of the Treaty like any other branches of economy and sporting organisations had to comply with the principles of the internal market and competition law.

In this context, co-ordination measures at Community level were suggested in order to strengthen legal certainty in connection with sporting activities and to

⁵⁶ Sports Director's Meeting, Helsinki, 18-20.10.1999, Conclusions of the Presidency, available at http://europa.eu.int/comm/sport/action_sports/helsinki/docs/b_sd99-conclusions_en.pdf.

⁵⁷ European Commission, report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework, Brussels, 10.12.1999, COM(1999) 644 final; for a more detailed analysis see Parrish, R., "The Helsinki Report on Sport: A Partnership Approach to Sport", (2000) 3(3) SLB, p. 16.

support the social function of sport. The Commission believed that there was “a need for a new approach to questions of sport” which should endeavour to preserve the special features of sport in an environment of economic and legal changes. As a consequence, it recommended more consultation between the various protagonists in sport, which were identified as the Community, the Member States and the sporting organisations, and called for a more coherent view of sport on a global basis. Significantly, the Commission pointed out that the specific characteristics of sport had to be taken into account when applying Community law to sporting matters, in particular as far as the competition rules were concerned. With regard to the organisational structure of sport in Europe, it accepted the monopoly status of the different sporting federations as a necessary means to bring together all the sports associations and competitors of one discipline. It was also acknowledged that regulatory measures of sports associations necessary to enable sporting competition would generally not be in breach of Community law, as long as they were “objectively justified, non-discriminatory, necessary and proportional”.

The Helsinki Report on Sport shows that the protocol annexed to the Amsterdam Treaty, despite the criticism of it being too general and non-binding, did undoubtedly influence the Commission’s approach to sport. The Report clearly links the need to regulate sport with its commercialisation, but at the same time identifies the necessity to treat sport differently in order to preserve its special features. Its significance as an official statement of the Commission’s position on sporting matters and the resulting influence on the Community’s sports policy should not be underestimated. Moreover, the Helsinki Report stresses that action at Community level alone will not be sufficient to protect the current structures and the traditional values of sport, and suggests deepening the co-operation between the EU and sports organisations.

After the Helsinki summit, the debate on sport in the European Union intensified, becoming an issue throughout the institutions: the Commission tried to develop its approach by establishing an ongoing dialogue with the European sports federations⁵⁸, while the European sports ministers continued their informal Council

⁵⁸ For example the Meeting between Mrs. Reding and the European Sports federations in Brussels on 17 April 2000, http://www.europa.eu.int/comm/sport/action_sports/dialogue/dialogue_en.html.

meetings⁵⁹. The Portuguese Presidency Conclusions in the first half of 2000, for example, deepened the discussion on the fight against doping and also debated the social dimension of sport, requesting the Commission and the Council to “take account of the specific characteristics of sport in Europe and its social function in managing common policies⁶⁰”.

1.2.2.5. The Judgments in *Deliège* and *Lehtonen*

In the meantime, the European Court of Justice issued two more judgments relating to sport, clarifying the relationship between internal rules of sporting organisations and the provisions on free movement. The first case, *Deliège*⁶¹, concerned selection rules for international judo tournaments which put a limit on the number of athletes from a particular national federation, leaving it up to the national federation to nominate the judokas it considered best suited to compete. Ms. *Deliège*, a professional judoka who had repeatedly not been picked by the Belgian judo federation to take part in European tournaments, claimed that the systematic requirement of a quota and selection at national level constituted a barrier to the free movement of services. The Court pointed out that selection rules like those at issue inevitably had the effect of limiting the number of participants in a tournament, but acknowledged that such a limitation was inherent in the conduct of an international high-level sports event, which necessarily involved the adoption of certain selection rules⁶². Having established that it naturally fell to the tournament organisers and sports federations in question to lay down appropriate rules for selection⁶³, the Court continued that the delegation of such a task to the national federations, which normally have the necessary knowledge and experience, was the arrangement adopted in most sporting disciplines and did not infringe Community law⁶⁴.

⁵⁹ For example the meeting in Lisbon on 10 May 2000 during the Portuguese Presidency.

⁶⁰ Portuguese Presidency Conclusions, 19 – 20 June 2000, available at http://www.europa.eu.int/comm/sport/action_sports/historique/docs/concl_feira_20000620-sport.pdf.

⁶¹ Cases C-51/96 & C-191/97 *Christelle Deliège v. Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549.

⁶² *Deliège*, at para 64.

⁶³ *Ibid*, at para 67.

⁶⁴ *Ibid*, at para 68.

The decision in *Lehtonen*⁶⁵ came out two days after *Deliège*. Hereby, the Court had to deal with transfer rules set up by the Belgian basketball association, which prohibited a club from fielding players who had moved from a club in another Member State in matches in the Belgian championship, if the transfer had taken place after a specified date. Although the Court considered the transfer rules to constitute an obstacle to the free movement of workers⁶⁶, it accepted that the setting of deadlines for transfers of players may be necessary to ensure the regularity of sporting competitions⁶⁷ and recognised this sporting aim as a possible reason for justification. Both judgments, which will be dealt with in depth later on, are remarkable in the sense that they recognised the (limited) power of self-management and self-regulation granted to sport governing bodies under Community law and served as an indication of the Court's willingness to take into account the specific characteristics of sport when applying EC law.

1.2.2.6. The Nice Declaration on Sport

For many it seemed as if the Community had finally come around to taking the view that sport should not be dealt with like any other economic activity and its organisation was best left to the sporting federations in order to protect the traditional sporting values. Accordingly, the 9th European Sports Forum in Lille presented an ideal opportunity for the sports organisations to push ahead their efforts to have a reference on sport included in the Nice Treaty. The football governing bodies in particular hoped for a Treaty amendment in order to protect the football transfer system, which had come under scrutiny by the European Commission. Not only sports representatives, but also the European Parliament⁶⁸ scented a second chance to have an article on sport included in the Treaty, after their hopes had been disappointed by the Amsterdam Treaty.

However, the Member States decided against a protocol approach and merely annexed a declaration on sport to the Presidency conclusions of their meeting in

⁶⁵ Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération Royale Belge des Sociétés de Basket-ball ASBL (FRBSB)* [2000] ECR I-2681.

⁶⁶ *Ibid.*, at para 49.

⁶⁷ *Ibid.*, at para 53.

⁶⁸ See the draft opinion of the Committee on Culture, Youth, Education, the Media and Sport for the Committee on Constitutional Affairs on the Treaty of Nice and the future of the European Union; available at <http://www.europarl.eu.int/meetdocs/committees/cult/20010410/435384en.doc>.

Nice⁶⁹. The declaration recapitulated the social significance of sport, pointing out the benefits of amateur and youth sport in European society and the important role of voluntary services in these sectors. Special attention was paid to the protection of young sportsmen and sportswomen in amateur, as well as professional sport. The European Council emphasised that the sports organisations' independence and their right to organise themselves should be recognised and added that the federation structure in European sport constituted the best way to guarantee the traditional sporting values and the solidarity between different levels of sport. In an economic context, concerns were expressed over the multiple ownership of sports clubs taking part in the same competition. Regarding the marketing of television rights, the European Council encouraged the distribution of revenues to lower levels, but did not tackle the question of collective selling agreements. Finally, the ongoing discussion on the football transfer system was mentioned. The European Council stressed the importance of a dialogue between the sports organisations, the Community and the Member States in order to ensure the compliance of the sports sector with EC law, as well as guaranteeing that the special features of sport are preserved.

The Nice Declaration on Sport was a clear political signal that the social and cultural dimensions of sport should feature more prominently in national and Community policies. Furthermore, it recognised the independence of the sporting organisations, indicating that governing bodies would largely be left to manage and regulate their internal affairs, provided they comply with Community law. The declaration is also significant in the sense that it offered some guidance on pending disputes such as the football transfer system and multiple ownership of sports clubs and clarified the relationship between sport and Community law. Although the declaration adopted in Nice was a policy declaration only and did not set out to extend Community responsibilities, it is an important milestone in the development of an EU sports policy, as it hardened the soft law approach to sport that was started with the Amsterdam Declaration on sport. It is the first time that the Member States

⁶⁹ "Declaration on the Specific characteristics of Sport and its Social Function in Europe, of which account should be taken in implementing Common Policies", hereinafter referred to as "The Nice Declaration on Sport", available at http://europa.eu.int/comm/sport/doc/ecom/decl_nice_2000_en.pdf.

expanded their view on sport in such length, which emphasises the significance of sport on a European level and makes it seem unlikely that those responsible for the application of the Treaty will ignore the declaration⁷⁰.

Following the Nice declaration, sport continued to be the focus of discussion on a Community level during the Swedish⁷¹ and Belgian Presidencies⁷², one of the main topics being the co-operation with the World Anti Doping Agency (WADA). However, arguably the most significant event at the time was the breakthrough in the negotiations on the football transfer regulations in March 2001. In the last few years, the Community has been concentrating on the social dimension of sport, trying to find ways to utilise sport's beneficial effects on a European level. In particular, the important role of sport in education and youth policy has been highlighted, culminating in the declaration of 2004 as the Year of Education through Sport. Also, the Community has been intensifying its dialogue with sports organisations, as the recent consultation conference on 14-15 June 2005 between Commission officials and representatives from the European sport world on the fight against doping, volunteering in sport and the social function of sport shows⁷³. In a different arena, the European courts have continued to shape the legal approach to sporting matters. The European Court of Justice issued two important judgments, *Kolpak*⁷⁴ and *Simutenkov*⁷⁵, on the issue of nationality restrictions, stating that in general athletes from associated countries may not be discriminated against. The Court of First Instance, on the other hand, confirmed the legitimacy of anti-doping regulations⁷⁶, albeit applying a somewhat unorthodox approach, which is open to criticism.

⁷⁰ In this context see Blackshaw, I., "The battle for a sports protocol continues" (2002) 5(1) SLB, p. 15, who points out that the Nice Declaration is "a powerful political statement of intent and one which, in my view, the Commission is likely to follow in the future".

⁷¹ Summary of the Presidency, Troika Meeting of Sports Ministers in Stockholm, 8.2.2001, available at http://www.europa.eu.int/comm/sport/doc/infor_meet/b_troika20010208_en.pdf and the Presidency Summary of the Meeting of Sports Directors in Solna, Sweden, on 18-19 April 2001, available at http://www.europa.eu.int/comm/sport/doc/infor_meet/solna200104_en.pdf.

⁷² Summary of the Troika Meeting with the ministers of sport, Brussels, 12.6.2001, available at http://www.europa.eu.int/comm/sport/doc/infor_meet/b_troika200107_en.pdf and Conference of the Sport Ministers of the 15 Member States of the EU, Brussels, 12.11.2001, Conclusions of the Belgian Presidency; available at http://www.europa.eu.int/comm/sport/doc/infor_meet/min-20011112-en.pdf.

⁷³ See the conference report "The EU and Sport - Matching Expectations", available at http://www.europa.eu.int/comm/sport/documents/workshop_report_en.pdf.

⁷⁴ Case C-438/00 *Deutscher Handballbund eV v. Maros Kolpak*, [2003] ECR I-4135.

⁷⁵ Case C-265/03 *Igor Simutenkov v. Ministerio de Educación y Cultura* [2005] ECR I-2579.

⁷⁶ Case T-313/02 *Meca-Medina & Majcen v. Commission* [2004] 3 CMLR 60.

Considering the recent discussions on FIFA's rules on non-solicitation in connection with Chelsea's attempt to poach Ashley Cole and Charleroi's law suit against FIFA for damages because of their star striker's injury during international duty, it is guaranteed that the European courts will continue to be occupied with sports related cases in the future.

1.2.3. Where Do We Go from Here?

It seems as if the sporting associations have finally overcome the shock caused by the decision in *Bosman* ten years ago and realised that sport is not the law-free zone they assumed it to be. Considering the fact that 18 out of the 24 Directorates General in the European Commission deal with sport in one way or the other, it is evident that the European Union will continue to shape the face of European sport. The range of the EU involvement in sport now includes areas such as free movement of persons, goods and services, health and safety, competition policy, animals in sport, taxation, economic and monetary union, funding for sport and sport for the disabled⁷⁷. In return, the Community has also changed its approach to sport over the years: whereas sport was initially dealt with purely from an economic point of view, there is now more focus on the social values of sport and a consensus between the EC institutions that the special characteristics of sport have to be taken into account when applying Community law. However, it is still unclear how far the Community is willing to go with the special treatment of sporting matters and whether there will be exemptions from EC law in special circumstances where the core values of sport are at stake. In any case, the initiative has to come from the different sporting organisations, as they are in the best position to identify those special characteristics of sport that need protection. It is to be hoped that the ongoing dialogue between the Community and the sporting organisations, institutionalised in the annual European Sports Forum, will help to fill in the gaps and to develop a new approach to sporting matters that will ensure the preservation of important sporting values. The fact that 2004 was declared the European Year of Education through Sport with an allocated budget of

⁷⁷ See "The impact of European Union Activities on Sport", Study by Coopers and Lybrand for DG X of the European Commission, (1995) 17 Loy. L.A. Int'l & Comp. L.J., p. 245.

£ 7.5 million is an indication that the Community has finally realised the huge social potential of sport and is definitely willing to pay more attention to sporting matters.

The most significant development in the relations between the Community and sport, however, is the inclusion of a reference to sport in the Constitutional Treaty which, provided the Constitution will eventually be ratified by the Member States, would grant the legal base to allocate funds for sports projects in the budget and may signify the beginning of a new chapter in European sports policy.

1.3. LIMITS TO THE APPLICATION OF EC LAW

Today it is widely accepted that, following the European Court of Justice's judgments in *Walrave*, *Donà* and *Bosman*, sport is subject to Community law when practised as an economic activity in the sense of Article 2 of the Treaty. However, although the Court clarified that it will not put sport beyond the reach of Community law, as this would "diminish the objective character of the law"⁷⁸, arguments in favour of a sporting exemption still exist. Thus, it is necessary to define the limits of Community law when applied to sport and to analyse whether there are loopholes which allow sport a complete, or at least partial, immunity from the application of the Treaty.

1.3.1. Sport as a Cultural Activity

Although the European Court of Justice has repeatedly rejected the idea of placing the whole sports sector outside the scope of EC law, the view that sport can best look after its own affairs and should be left unchallenged by law, is still widespread. The case for such an exemption from Community law is often based on the argument that sport is a major component of national popular culture and therefore falls under Article 151 of the Treaty. Article 151(1) calls upon the Community to "contribute to the flowering of the cultures of the Member States" and allows the Union to "support and supplement" actions of the Member States. Thus, the Community does not have the competence to regulate cultural activity. Moreover, Article 151(4) provides for an obligation on the Community to take cultural aspects into account in its action under other provisions of the Treaty.

Although sport undoubtedly shares similar characteristics with culture, it may nevertheless be disputed that it indeed qualifies as a cultural activity in the sense of Article 151. The opinions are varied: whereas some argue that the differences are such as to warrant a distinction, pointing out that the "contribution to the development and consolidation of emerging nations in cultural terms came more

⁷⁸ *Bosman*, at para 77.

through the intellectual pursuits of art, music and literature than sport”⁷⁹, the majority of writers see sport as a part of our culture owing to its popularity and influence on modern society⁸⁰.

Although the founders of the Maastricht Treaty might not have had sport in mind when drafting Article 128 (now Article 151) on culture, sport undoubtedly has an immense cultural significance: a majority of people practise sport actively and/or observe it as spectators in the stadiums or through various forms of broadcasting coverage. No other event brings so many people from different cultures around the globe together, as the FIFA World Cup or the Olympic Games. Bill Shankley’s often quoted belief that football is not just a matter of life or death, but much more important, may seem exaggerated to some, but for many avid football supporters the loss of an important match may well be considered worse than a death in the family. Naturally, there is a downside to sport in the form of violence, racism and sectarianism, but these phenomena only underline the cultural significance of sport as “a crucial component of contemporary society”⁸¹.

However, even if sport is considered a cultural activity, the fact that Article 151 does not offer a sufficient basis for Community competence does not automatically remove sport from the scope of EC law altogether. As has been shown above, sport not only has characteristics that link it to culture, but, when practised professionally, it constitutes an economic activity. In accordance with the aims of the Treaty, it is this economic nature that brings sport under the scope of Community law. Whenever a subject matter can be identified as an economic activity in the sense of Article 2, the fact it might touch upon areas which do not fall under the Treaty cannot be used as an argument that Community law does not apply. Consequently, the Court has confirmed Community competence in subject matters such as

⁷⁹ Gardiner, S., *Sports Law*, (2nd edn., Cavendish Publishing, London, 2001), p. 30.

⁸⁰ See for example Hargreaves, J., *Sport, Power and Culture: A Social and Historical Analysis of Popular Sports in Britain*, (Palgrave Macmillan, London, 1986), p. 9; Scholz, R. & Aulehner, J., “Die ‘3+2’-Regel und die Transferbestimmungen des Fußballsports im Lichte des europäischen Gemeinschaftsrechts”, (1996) 2 Spurt, p. 44; Gardiner, S. and Felix, A., “Juridification of the Football Field: Strategies for Giving Law the Elbow” (1995) 5(2) *Marquette Sports Law Journal*, p. 191, who argue that “the cultural significance of football is enormous” as “it is truly a global sport”.

⁸¹ Blake, A., *op. cit. supra note 24*, p. 11.

religion⁸², broadcasting⁸³ or education⁸⁴, based on the economic relevance in the particular cases. Apart from that, the possibility that a cultural matter may be touched upon under other Community competences has expressly been provided for in the Querschnittsklausel of Article 151(4). Thus, a total exemption of cultural matters from the application of the Treaty was obviously not intended.

However, according to the wording of Article 151(4), the Community is under the obligation to take cultural interests into account whenever it deals with a cultural subject in its actions under another Treaty article. Given the cultural characteristics of sport, one could argue that owing to Article 151(4), sporting interests have to be taken into consideration when applying EC law, such as the provisions on free movement or competition law. Having said that, in *Bosman* the Court dismissed a limitation of Community competence by reason of the cultural nature of sport⁸⁵. Thus, the Court held that where a case concerned the fundamental Treaty freedoms, it was not related “to the conditions under which Community powers of limited extent, such as those based on Article 128(1) [now 151(1)] may be exercised”⁸⁶.

The Court’s reluctance to apply Article 128(4) [now 151(4)] as a legal basis to pay attention to sporting interests is arguably open to criticism. First of all, the Court overlooked that Article 151 not only governs the conditions under which Community powers in cultural matters may be exercised, but also limits Community action in areas of classical Community competence in so far as it contains an obligation to take into account cultural interests. Additionally, an interpretation of Article 151(4), which requires the Community to take sporting interests into account when acting under other Treaty provisions, would open up the possibility to deal with sporting matters in a more flexible way and preserve their special characteristics more effectively⁸⁷. Thus, a chance to assess a case in its entirety would be provided, rather than having to make the effort of trying to divide the economic from the

⁸² See for example Case 196/87 *Steymann v. Staatssecretaris van Justitie* [1988] ECR 6159.

⁸³ See Case 155/73 *Sacchi* [1974] ECR 409 and Case 52/79 *Procureur du Roi v. Debauve* [1980] ECR 833.

⁸⁴ See Case 9/74 *Casagrande v. Landeshauptstadt München* [1974] ECR 773.

⁸⁵ *Bosman*, at para 78.

⁸⁶ *Ibid*, at para 78.

⁸⁷ See also Palme, C., “Das *Bosman*-Urteil des EUGH: Ein Schlag gegen die Sportautonomie?”, (1996) JZ, p. 240.

sporting aspects, an endeavour which proves to be quite impossible in most cases⁸⁸. Such a reading of Article 151 would also give full effect to the Amsterdam Declaration on Sport, changing its soft-law nature to a legal obligation that would require the Community institutions to take sporting matters into account when acting upon any other areas of competence. The limits to this obligation could be found in the general Community principle of proportionality, which would ensure that the rules of the sporting associations did not go any further than what is necessary to achieve the sporting aim.

The practical advantages of a more open interpretation of Article 151 may be demonstrated by taking the example of the nationality clauses at issue in *Bosman*, where such an approach might have allowed a compromise such as a 50 percent mark. This would still have enabled footballers to move to another club within the European Union, but at the same time would have taken into account the cultural aspects of football by ensuring that the fans are still able to identify themselves with their club, rather than envisaging the possibility of, say, an English club consisting solely of German players.

1.3.2. The Amsterdam and Nice Declarations

The Amsterdam and Nice Declarations on Sport have been argued to contain an obligation for Community authorities to take into account the special characteristics of sport when applying EC law. As pieces of soft-law, though, the declarations do not have any power to override relevant Community law; the call on the bodies of the European Union to listen to sports associations when important questions affecting sport are at issue and the general plea to take sporting interests into account when applying the provisions of the Treaty constitute a recommendation, rather than an obligation. However, the fact that the Court has referred to the Amsterdam Declaration in its decisions in *Deliège*⁸⁹ and *Lehtonen*⁹⁰ emphasises the Court's willingness to pay attention to the social and cultural values of sport.

⁸⁸ This was also an argument of UEFA in *Bosman*, which wrongly considered the difficulties of differentiating the economic from the sporting aspects as a reason for a total exemption of sport from EC law.

⁸⁹ *Deliège*, at para 42.

⁹⁰ *Lehtonen*, at para 33.

1.3.3. The Internal Rules of Sports Organisations

One of the main arguments against the intervention of Community law in sporting matters is the alleged immunity of sports organisations' rules from external regulation. Decisions and statutes of sporting bodies are argued to form a separate legal system that has its own internal constitutionalism, operating a sporting rule of law. Thus, internal rules of sports organisations are claimed to fall outside the control of national or supranational law⁹¹. The supporters of such autonomy for sports associations plead that expert and inside knowledge is the best basis for effective regulation and that the interest of sport is best looked after by the relevant sports' governing bodies. External regulation by people who do not understand how a sport functions is thought to be less likely to be followed and to threaten the system of sport as a whole⁹².

Before discussing these arguments in more detail, though, it is appropriate to examine the organisation of sport in Europe. The traditional structure of sports organisations in the Member States generally resembles a pyramid with a hierarchy, the foundation of which is formed by the clubs⁹³. The clubs, which are mainly run by amateurs and unpaid volunteers, organise sport on a local level, offering everyone the possibility to practise sport and are also the starting point for young athletes who want to take up sport professionally. In contrast to the US model, where sport is much more commercialised, amateur and professional sport are closely linked at club level and even big clubs that are heavily engaged in professional competitions, play an important role at grassroots level. The clubs are usually members of the regional and national federations, which are responsible for organising and co-ordinating sport on a regional and national basis respectively. The national federations have a monopolistic position in so far as there is only one national federation for each sport. These federations are the top national authority in a particular sport, acting as a

⁹¹ See Foster, K, "How Can Sport be Regulated", in Greenfield S. & Osborn, G. (eds), *Law and Sport in Contemporary Society* (Frank Cass, London, 2000), p. 267; see also Caiger, A., "Re-regulating Professional Sport in the European Union" in Caiger, A. and Gardiner, S. (eds), *Professional Sport in the EU: Regulation and Re-regulation*, (T.M.C. Asser Press, The Hague, 2000), who claims that sporting rules establish a system of a "Lex Sportiva", analogous to the Lex Mercatoria.

⁹² *Ibid*, pp. 278 – 279.

⁹³ For a more detailed analysis see the DG X document "The European Model of Sport", *op. cit. supra note 53*.

regulatory body, as well as organising national championships. The national associations are members of the international sports bodies and are bound by the higher-ranking authority's rules.

1.3.3.1. Total Autonomy for Sports Bodies?

In professional team sports, a player concludes a contract with a club and is then granted a licence by the national association to play for this particular club. This licence expresses the fact that the player has joined the sports association and recognises the statutes and rules of the relevant national and international associations, including their disciplinary power. This system enables athletes to compete under standardised conditions by establishing rules that apply to all sportsmen and sportswomen in the same way and that are recognised by anybody involved in the sport. Even though it is undisputed that sporting competition requires a controlling body with regulatory power that lays down certain rules and enforces them, the sports associations have so far failed to come up with a legal base that would provide them with total immunity from legal supervision. One of the main arguments for the autonomy of sports associations is the extremely high degree of organisation within such bodies, featuring a well-developed pattern of globalised regulation that is claimed to make legal intervention from outside unnecessary. However, as has been pointed out by Weatherill, "the simple assertion of the adequacy of self-regulation cannot suffice; which industry would not make such a claim?"⁹⁴. Besides, taking into account that the governing bodies in sport have substantial economic control over clubs and players, with the potential of threatening the livelihood of thousands of people involved in the business of sport, such power cannot be exercised unsupervised without the danger of grave injustice or financial damage. Being unelected and unaccountable, the governing bodies' power is absolute and they are able to control the market entry of new clubs to a sport or to regulate the market in players through the introduction of transfer systems. The need to control sports bodies and their internal rules is probably best illustrated by the *Bosman* case. In the absence of Community intervention, football's governing bodies

⁹⁴ Weatherill, S., "Do sporting associations make law or are they merely subject to it?" (1999) 13 *Amicus Curiae*, p. 24.

would presumably have never abolished the old transfer system, whereby players such as Mr. Bosman could effectively be forced to give up their careers.

The world of sport has repeatedly argued in favour of an autonomy for the sports governing bodies on the grounds that sport is best capable to look after its own affairs, failing to understand that even though self-government ensures a certain level of organisation within a sport and may well be more efficient and desirable from a sporting point of view, these arguments do not provide a sufficient legal base for a complete exemption of sporting rules from any legal supervision.

1.3.3.2. The Legal Autonomy of Sports Associations

Although the European Court of Justice has, particularly in its most recent decisions, affirmed the right to self-governance of sports associations to a certain extent, the legal base for the organisational authority of such bodies remains unclear. As the Treaty does not offer any guidance on the matter, it is necessary to examine whether secondary legislation can provide an answer. Albeit not being in force as yet, the only reference to matters of self-regulation and organisational authority of associations can be found in the Commission proposal for a Council Regulation on the Statute for a European Association⁹⁵. According to Article 1 of the draft statute, a European Association would be defined as a permanent grouping of natural or legal persons whose members pool their knowledge or activities for a purpose in the general interest. Whilst it is stated that the European Association “shall be free to determine the activities necessary for the pursuit of its objectives”, the association’s organisational authority is limited by the “objectives of the Community, Community policy and the public policy of the Member States”. This provision illustrates that the Community acknowledges a certain autonomy of associations that enables them to carry out any activity necessary to achieve their aims, but it makes clear that those activities will always be subject to control by EC law. Moreover, the association shall pursue its activities in accordance with the principles derived from its character as a group of persons. With regard to sports organisations, it has been argued that as a consequence only activities relating exclusively to sport may be carried out, which

⁹⁵ See Commission Proposals COM(91) 273/1 and 273/2 final, OJ C 99, 21.04.1992 and amended proposals COM(93) 252 final, OJ C 236, 31.8.1993.

would exclude activities pursuing business interests⁹⁶. Together with the stipulation that profits from any economic activity may not be divided amongst the members, which would, for example, forbid the practice of distributing television revenues by the sports associations to the clubs, this means that sports associations usually do not qualify as a European Association in the sense of the draft statute.

1.3.3.3. Freedom of Association

The case for the legal autonomy of sports associations is generally based on the claim that the power of the sports associations to set internal rules can be deduced from the basic right of freedom of association. Thus, it is necessary to examine what the concept of freedom of association entails and to what extent it may be invoked in order to limit the application of the Treaty.

1.3.3.3.1 Human Rights in EC Law

The European Union does not (yet) have a legally binding catalogue of human rights and basic freedoms in the Treaty. However, Article 6(2) of the Treaty on European Union provides that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law⁹⁷. The right of freedom of association is protected by Article 11 of the European Convention of Human Rights and Fundamental Freedoms⁹⁸ and is also mentioned in the constitutions of nearly every Member State⁹⁹. Consequently, it is part of the Community legal order, a fact that has also been recognised by the Court in *Bosman*¹⁰⁰. Additionally, the freedom of assembly and of association is also mentioned in Article 12 of the Charter of Fundamental Rights of the European Union, proclaimed at the European Council in

⁹⁶ See Vieweg, K., “The Legal Autonomy of Sport Organisations and the Restrictions of European Law”, in Caiger, A. & Gardiner, S. (eds), *op. cit. supra note 91*, p. 91.

⁹⁷ See Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, at para 15 and in particular the recent Case C-117/01 *K.B. v. National Health Service Pensions Agency*, [2004] ECR I-541, at paras 33-34, where the ECHR was applied directly for the first time.

⁹⁸ Hereinafter referred to as “ECHR”.

⁹⁹ In respect of the old Member States see the constitutions of Germany (Art. 9 para 1), Belgium (Art 27), Denmark (§ 78), Finland (§ 10a), Greece (Art.12), Ireland (Art. 40), Italy (Art. 18), Luxembourg (Art. 26), Holland (Art. 8), Portugal (Art. 46), Sweden (Chapter II, §§ 1 No 5, 14), Spain (Art.22); in Austria, the ECHR itself is part of the constitution, see B-VG BGBl. Nr. 59/1964.

¹⁰⁰ *Bosman*, at para 79; see also Case 175/73 *Gewerkschaftsbund* [1974] ECR 917.

Nice in December 2000. As is commonly known, the Charter of Fundamental Rights has been integrated into the Treaty establishing a Constitution for Europe and although it does not (yet) have the full force of the law, it is the result of a consensus between the Member States and reflects their common legal tradition. Besides, the Charter could become binding through being interpreted as enshrining the general principles of Community law and has already been referred to by the Court of First Instance¹⁰¹ and on several occasions in the opinions of different Advocates-General¹⁰².

Taking into account Article 6(2) of the Treaty on European Union, the scope of the basic right of association is determined by the ECHR. Similarly, Article 52 of the Charter of Fundamental Rights of the European Union states in paragraph 3 that “in so far this Charter contains rights which correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention”. Consequently, the level of protection of Human Rights in the European Union may not, in any instance, be lower than that guaranteed by the ECHR.

1.3.3.3.2 Qualification of Sports Bodies as Associations?

In the light of the ECHR, the term “association” presupposes a voluntary grouping for a common goal¹⁰³, which includes political parties¹⁰⁴, trade unions¹⁰⁵ or hunting clubs¹⁰⁶. Considering this, national and international sports federations undoubtedly

¹⁰¹ See for example Case T-54/99 *max. mobil Telekommunikation Service GmbH v. Commission*, [2002] ECR II-313 in which the Court based its judgment on Article 41(1) (right to good administration) and Article 47 (judicial review) of the Charter.

¹⁰² See in particular AG Tizzano in Case C-173/99 *The Queen v. Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* [2001] ECR I-4881, at para 26, who considered the Charter as a “substantive point of reference”; also AG Alber in Case C-340/99 *TNT Traco SpA v. Poset Italiane SpA and Others* [2001] ECR I-4109, at para 94.

¹⁰³ *Young, James and Webster v. United Kingdom* (App. No. 7601/76) [1982] 4 EHRR 38.

¹⁰⁴ *United Communist Party of Turkey and Others v. Turkey* (App. No. 19392/92) [1998] 26 EHRR 121.

¹⁰⁵ Guradze, H., *Die Europäische Menschenrechtskonvention*, (Vahlen Verlag, Berlin, 1968), p. 167; Nedjati, Z., *Human Rights under the European Convention*, (North Holland Publishing, Amsterdam, 1978), p. 198; Jacobs, F. & White, R., *European Convention on Human Rights*, (Oxford University Press, Oxford, 2002), p. 294; Council of Europe, “Short Guide to the European Convention on Human Rights” (Council of Europe Publishing, Strasbourg, 1991), p. 93.

¹⁰⁶ *Chassagnou and others v. France* (App. Nos 25088/94, 28331/95, 28443/95), [2000] 29 EHRR 615.

qualify as associations in the sense of the ECHR: sports regulatory bodies such as FIFA or UEFA are made up by people who share the same interest and have congregated to pursue a common goal - the advance of the interest of its members and of the sport in general, a fact which is illustrated by FIFA's motto "For the good of the game". However, on first sight the above mentioned regulations in European team sports, which provide that a player is not allowed to play for a certain club unless he has become a member of the national association in question and is granted a licence to play, do not seem to comply with the criterion of voluntariness. The issue whether groupings with compulsory membership may be qualified as associations in the sense of the ECHR has usually been discussed in connection with trade unions. In this context, a system whereby workers are required to become members of a particular union in order to be able to exercise their trade, is widely considered not to contradict the classification of trade unions as associations in the sense of Article 11 of the ECHR¹⁰⁷.

1.3.3.3.3 Scope of the Basic Right of Association

The right of association includes the right to choose whether or not to form, join or quit an association¹⁰⁸. This basic freedom not only confers rights upon individual persons, but also grants rights to the association as such, protecting those activities of the association that relate to its common interest¹⁰⁹. The protection of collective activities embraces the right to define the association's interests, the authority to establish rules to pursue these interests, to make use of these rules and to enforce them if necessary¹¹⁰. It also enables the association to give itself an internal structure, defining a system of representation and to choose the means necessary to fulfil its aim. However, in this context it is important to note that by joining the association, the member expresses his agreement with the common goal and recognises the

¹⁰⁷ See Jacobs, F. & White, R., *op. cit. supra note 105*, p. 295; Council of Europe Short Guide, *op. cit. supra note 105*, p. 91.

¹⁰⁸ Jacobs, F. & White, R., *op. cit. supra note 105*, p. 291; Council of Europe Short Guide, *op. cit. supra note 105*, p. 91, Nedjati, Z., *op. cit. supra note 105*, p. 198; Guradze, H., *op. cit. supra note 105*, p. 162.

¹⁰⁹ See Gramlich, L., "Grundfreiheiten contra Grundrechte im Gemeinschaftsrecht?", (1996) 19 DÖV, p. 807; Guradze, H., *op. cit.*, p. 163; Nedjati, Z., *op. cit.*, p. 198.

¹¹⁰ See Vieweg, K. in Caiger, A. & Gardiner, S. (eds), *op. cit. supra note 91*, p. 91; Vahrenwald, A., "Am I So Round with You as You with Me? The *Bosman* Case before the European Court of Justice", (1996) 7(4) EntLRev, p. 153; Röhrich, V. (ed.), *Sportsgerichtbarkeit* (Boorberg Verlag, Stuttgart, 1997), p. 21.

association's regulatory authority. This means that the association has a legal personality independent from its members and the individual will of a single member and the collective will of the association do not necessarily have to correspond.

In a sports context, freedom of association confers upon a sports body the right to set rules which it considers best suited to pursue its main interest, the particular sport in question. In relation to the individual sportsman or sportswoman, their voluntary decision to join the sports association includes the acknowledgement of the association's power to establish certain rules and make decisions in line with its statutes, such as disciplinary action¹¹¹. Still, it is evident that an associations' autonomy cannot be unlimited and its rules have to be subject to external control¹¹².

1.3.3.3.4 Limitations to the Basic Right of Association

Since fundamental rights are part of Community law "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms"¹¹³, the limits to a basic right can be found in the text of the Convention. This is also acknowledged by the Charter of Fundamental Rights of the EU, which states in Article 52(3) that the meaning and scope, including limitation of rights that correspond to rights guaranteed by the ECHR, must comply with the standards laid out in the ECHR. According to Article 11(2) ECHR, restrictions may be placed on the exercise of the right to freedom of association if they are "prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others". The European Court of Human Rights, building on the European Commission of Human Rights' case law, has established a threefold test in order to determine whether an interference with human rights is in accordance with the law¹¹⁴.

First of all, the limitation has to have a basis in national law, set by national parliaments according to the standards of a "democratic society". With regard to

¹¹¹ See Article 5(1) of the current FIFA "Regulations for the Status and Transfer of Players" (hereinafter referred to as 2005 Regulations") which establishes that by registering with a national association to play for a certain club "a player agrees to abide by the Statutes and regulations of FIFA, the confederations and the Associations".

¹¹² See Pfister, B., "Sportregeln vor staatlichen Gerichten", (1998) 6 SpuRt, p. 224; Röhrich, V., *op. cit. supra note 110*, p.22.

¹¹³ EU Treaty, Article 6(2).

¹¹⁴ See Jacobs, F. & White, R., *op. cit. supra note 105*, p. 202.

Community law, the fact that the Treaty has been signed or respectively accepted by democratically legitimated representatives of all Member States is sufficient for limitations prescribed by the Treaty to fulfil the standards of Article 11(2) ECHR. However, considering the fact that the European Parliament still does not have the full rights of a national parliament as far as legislative powers are concerned, one may question the quality of EC secondary legislation as being capable of setting boundaries to a basic freedom. Again, it can be argued that all Member States have passed legislation in line with the principles of a democratic society, accepting the legislative process set out in the Treaty.

The second requirement for a restriction of a basic freedom to be in accordance with the ECHR is accessibility of the law at issue. Thirdly, the law must be formulated in such a way that a person can foresee the consequences, which a given action will entail. It may be assumed that these two requirements will usually not pose any problems as regards to limitations to basic rights brought about by EC law.

Taking into account the reasons for which freedom of association can be limited according to Article 11(2) ECHR, the only one relevant to sporting rules is the protection of the rights and freedom of others, which includes any rights guaranteed by national or international law. It is important to note that although the members of an association have acknowledged the association's common goal and submitted to its organisational authority, the individual member is still an "other" person in relation to the association and has not automatically waived all personal rights¹¹⁵. Consequently, the right to self-regulation of sports bodies can be limited if the restriction is necessary in order to protect the right to free movement of individual athletes. Regarding the rules on competition law, it could be argued that Articles 81 and 82 ensure the proper functioning of the trade between Member States, protecting the property rights of those competing in the market and of the consumers.

When deciding whether a limitation to the freedom of association is necessary in a democratic society, the European Court of Human Rights examines whether the interference corresponds to a pressing social need and does not go any further than is

¹¹⁵ See Gramlich, L., *op. cit. supra* note 109, p. 808.

necessary to address the legitimate aim pursued. This test requires a balancing of the severity of the restriction against the importance of the public interest. However, the ECHR gives the contracting states a certain margin of appreciation when judging on the importance of certain rights and the necessity of a limitation. In case of the EC, this means that in case of a conflict between the freedom of association and a legitimate public interest such as the free movement of workers, there is generally room for discretion as to which right has more significance in a Community context, although a certain balancing of rights will always be required.

This has been demonstrated in *Schmidberger*¹¹⁶, concerning the question whether a restriction of the free movement of goods, caused by a demonstration blocking a major transit route, may be justified under consideration of the freedom of expression and freedom of assembly guaranteed by Articles 10 and 11 ECHR. Having established that both the Community and its Member States are required to respect fundamental rights, the Court stated, “the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty”¹¹⁷. However, the Court added that according to paragraph two of Articles 10 and 11 ECHR, the exercise of these rights may be restricted, “provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed”¹¹⁸. The Court concluded that “the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests”¹¹⁹, albeit acknowledging that the “competent authorities enjoy a wide margin of discretion in that regard”¹²⁰.

1.3.3.3.5 The Basic Right of Association in Case law

It is significant that the Court, bar one exception, has never explicitly referred to freedom of association when judging on the compatibility of sporting rules with

¹¹⁶ Case C-112/00 *Schmidberger v. Republic of Austria* [2003] ECR I-05659.

¹¹⁷ *Ibid*, at para 74.

¹¹⁸ *Ibid*, at para 80.

¹¹⁹ *Ibid*, at para 81.

¹²⁰ *Ibid*, at para 82.

Community law. On the contrary, the Court emphasised in its first sports judgment that the legal autonomy of sporting associations cannot be used as an argument to prevent the application of the provisions on free movement to measures adopted by sports bodies¹²¹. Although the Court allowed nationality restrictions in respect of team selection rules under certain circumstances, the exemption was based on the unique nature and the context of matches between national teams, rather than on the basic right of association.

In *Bosman*, the Court finally touched upon freedom of association, even recognising it as one of the fundamental rights that are protected in the Community legal order¹²². However, it quickly rejected the possibility of the football associations invoking their freedom of association in defence of the transfer system, stating that the rules at issue “cannot be seen as necessary to ensure enjoyment of that freedom by those associations, by the clubs or by their players, nor can they be seen as an inevitable result thereof”¹²³. The Court’s dismissal of the sporting bodies’ right to self-governance without any further consideration certainly did not offer the right of association the recognition it deserves as a basic right protected by the European Convention on Human Rights, as well as Community law itself.

In this context, the opinion of Advocate-General Lenz in *Bosman* is of particular interest. Albeit detecting a conflict between the right to freedom of movement and the right of association, he rejected the idea of a balancing of rights, claiming that only an interest of the association that is of “paramount importance” could justify a restriction on freedom of movement¹²⁴. Bearing in mind the significance of the basic right of association in the European Union, it would have been necessary carefully to analyse the relation between both rights in the particular case before deciding which interest deserves more protection, instead of, as a matter of principle, automatically granting the free movement of workers precedence over the right of association.

In contrast to the Court and the Advocate-General, the majority of scholars treated the situation in *Bosman* as a clash between two rights of equal importance,

¹²¹ *Walrave*, at para 18.

¹²² *Bosman*, at para 79.

¹²³ *Ibid*, at para 80.

¹²⁴ See AG Lenz in *Bosman*, at para 216.

which required a balancing between the right of association and the freedom of workers. Thus, the *Bosman* judgment was heavily criticised in this respect¹²⁵. The Court was argued to have passed on the opportunity to clarify the scope of the right of association in Community law and was condemned for dismissing the relevance of this fundamental right without effectively considering a potential conflict with the Treaty freedoms¹²⁶. However, the latest judgments concerning the internal rules of sporting associations, despite not explicitly mentioning freedom of association, are pointing in the right direction in so far as the Court has expressed its willingness to acknowledge the autonomy of sports organisations to a greater extent. In *Deliège*, for example, the Court, having established that selection rules were inherent in the conduct of an international sports event, decided that it should be left to the sports bodies concerned to adopt the appropriate rules, as they had the required knowledge and experience.

Having said that, one should also pay attention to the opinion of Advocate-General Alber in the *Lehtonen* case. After pointing out that sport cannot exist without fixed rules, he concluded that self-regulation was appropriate in principle and justified by freedom of association. In order to judge whether the transfer periods in question were in breach of Community law, the Advocate-General examined whether the rules constituted an unreasonable hindrance to free movement. Although this approach shows first signs of an evaluation of the conflicting rights in question, the Advocate-General's general conclusion that overt barriers to access cannot be justified by freedom of association in any case goes too far, as each different case of a clash of rights merits thorough consideration, weighing up the relevance of each right in the particular situation.

¹²⁵ See Gramlich, L., *op. cit. supra* note 109, p.808; Imping, A., "Ausländer-Quote im Profifussball", (1996) 6 EWS, p.197; Streinz, R., "Die Rechtssprechung des EUGH nach dem *Bosman* Urteil" in Tettinger, P. (ed.), *Sport im Schnittpunkt von Europäischem Gemeinschaftsrecht und nationalem Recht* (Boorberg Verlag, Stuttgart, 2001), p. 46; Hobe, S. & Tietje, C., "Europäische Grundrechte auch für Profisportler" (1996) 6 JUS, p. 490; Schroeder, W., "Anmerkung zu *Bosman*" (1996) 5 JZ, p. 256; Trommer, H., *Die Transferregeln im Profisport im Lichte des Bosman –Urteils im Vergleich zu den Mechanismen im bezahlten amerikanischen Sport* (Duncker & Humblot, Berlin, 1999), p. 69; Scholz, R. & Aulehner, J., *op. cit. supra* note 80, p. 45.

¹²⁶ See Gramlich, L., *op. cit. supra* note 109, p. 809; Streinz, R. in Tettinger, P. (ed.), *op. cit. supra* note 125, p. 46; Röthel, A., "Anmerkung zu den EUGH Urteilen *Deliège* und *Lehtonen*", (2000) EuZW, p. 380; Schroeder, W., *op. cit. supra* note 125, p. 256.

Lastly, although not directly related to the question of legal autonomy of sports bodies in EC law, a recent case before the Court of First Instance, *Piau v. Commission*¹²⁷, is worth mentioning in this context. In the case at hand, the Court of First Instance had to assess FIFA's rules on players' agents under EC competition law. Having established that the rules at issue "were adopted by FIFA of its own authority and not on the basis of rule-making powers conferred on it by public authorities in connection with a recognised task in the general interest concerning sporting activity (see, by analogy, Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraphs 68 and 69)"¹²⁸, the Court went on to state that "those regulations do not fall within the scope of the freedom of internal organisation enjoyed by sports associations either"¹²⁹. Moreover, the Court of First Instance questioned FIFA's legitimacy to enact such rules, which touch on fundamental freedoms, claiming they did not have a sports-related object, but regulate an economic activity that was held to be peripheral to the sporting activity in question. Pointing out that the adoption of such rules by a private-law body, "cannot from the outset be regarded as compatible with Community law", the Court stated that the regulation of an economic activity concerning neither the specific nature of sport nor the freedom of internal organisation of sports associations, fell within the competence of the public authorities¹³⁰. Ultimately, the Court considered that the question of FIFA's legitimacy to issue such rules was not the subject of judicial review in the case at issue and went on to assess the regulations on players' agents under EC competition law.

The case is of special interest, as the Court has made clear that there are limits to the legal autonomy of sports bodies not only in so far as restrictions imposed by EC law are concerned, but also regarding the subject matter of rules adopted by such associations. It certainly is questionable whether sports bodies should have the power to regulate the economic activity of third persons, if such activity is not closely related to the organisation of the sport in question. On the other hand, it has to be considered that with the exception of France, no regulations concerning the activity

¹²⁷ Case T-193/02 *Laurent Piau v. Commission* [2005] 5 CMLR. 2.

¹²⁸ The *Wouters* case will be analysed below under point 5.1.3.1.

¹²⁹ *Piau v. Commission*, at para 74.

¹³⁰ *Ibid*, at paras 77-78.

of players' agents are in place in the Member States. Taking into account that agents are nowadays involved in the vast majority of transfers and that in the absence of rules regulating their professional activity, players are in danger of falling prey to disadvantageous offers, it is submitted that FIFA should be entitled to provide the necessary protection for players and clubs where the national authorities have failed to do so¹³¹.

Be that as it may, as a principle, it is important to note that whenever an organisational rule of a sports association collides with a provision of Community law, a balancing of the different interests is required, judging on a case-to-case basis. However, in order to be able to take into account the interests of the sport associations, it is necessary for those bodies to establish which sporting aims in particular they consider as being vital for the existence of their sport. The Court has already acknowledged certain sporting aims such as maintaining a sporting balance between clubs and the development of youth sport as being legitimate. It is now up to the sports bodies to work together with the Community and reach an understanding as to which other sporting values should be recognised by EC law and may be used as a justification for sporting rules that are in conflict with the aims of the Treaty.

Despite the fact that sports associations have a limited right to self-governance based on freedom of association, this does not mean that they stand above the law; sporting rules will usually attract the attention of Community officials when having an economic dimension. However, by establishing a dialogue with the EU and adhering to the principle of "good governance", sports governing bodies are able to minimise the risk of legal intervention. This includes the introduction of a democratic structure at all levels, transparency of governing standards and the avoidance of conflict of interest and of private gain from the exercise of sporting authority. By doing so, the governing bodies would probably not be able to prevent the application of Community law, but transparency and accountability of sporting

¹³¹ On the other hand, it could be argued that the fact that the Member States have generally not implemented legislation regulating the activity of players' agents, implies that they simply do not feel the need to do so and thus, everybody intending to become a players' agent should be able to take up this profession without any further restrictions. However, it is submitted that the absence of national legislation on the matter stems from the fact that this subject is considered to fall in the sports bodies' competence, rather than the opinion that regulation is not required.

rules would definitely strengthen their position and return credibility to sports governance.

1.3.3.4. The Principle of Subsidiarity

A further argument for the immunity of rules adopted by sports organisations from Community law is based on the principle of subsidiarity, brought before the Court in *Bosman* by the German government. According to Article 5 of the Treaty, this Community principle entails that in areas which do not fall within its exclusive competence, the Community shall take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can be better achieved by the Community. The Court in *Bosman* did not accept an interpretation of the principle of subsidiarity that would lead to “a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty”¹³².

When considering the rationale behind the subsidiarity principle, it becomes evident that it cannot be used as a valid argument to limit the application of Community law to sporting matters. The principle of subsidiarity is intended to restrict Community competences in order to ensure decentralisation and to guarantee that Community affairs are dealt with on the appropriate level, according to the subject matter. However, in the case of professional sport, the application of the Treaty is based on the fact that sport is practised as an economic activity, which means that it is a matter of exclusive Community competence.

1.3.4. Sport as an Economic Activity

Following the Court’s sports judgments, sport comes under the scope of Community law when practised as an economic activity in the sense of Article 2 of the Treaty. Without doubt this includes professional sportsmen or sportswomen who earn a living by practising sport, but when it comes to semi-professionals and amateurs, it can sometimes be difficult to establish whether they are engaged in an economic activity.

¹³² *Bosman*, at para 81.

The issue arose in connection with the *Deliège* case, where the Court had to rule on the professional status of a Belgian Judoka who claimed the selection rules of the Belgian judo federation to be in breach of Community law. In this context, the Court initially pointed out that the distinction between amateur and professional athletes has become less clear in recent years and well-known sportsmen and sportswomen nowadays regularly receive a significant income from sponsoring and advertising contracts, despite being ranked as amateurs by their sports federation. It continued to argue that the notion of economic activity in Article 2 defined the field of application of the fundamental freedoms guaranteed by the Treaty and thus should not be interpreted restrictively¹³³. Consequently, the Court held that it could not be left to the particular sports federation to determine whether an athlete is an amateur or a professional. The decisive factor is therefore not the classification by the sports associations in question, but whether the sportsman or sportswoman in question is practising sport as an economic activity¹³⁴.

According to the Court, an economic activity within the meaning of Article 2 of the Treaty is defined as “the pursuit of an activity as an employed person or the provision of services for remuneration¹³⁵”, provided that the work performed is “genuine and effective and not purely marginal and ancillary”¹³⁶. Following that, a sportsman or sportswoman who is actually paid for practising sport will always be engaging in an economic activity, whereas an athlete who merely receives reimbursement for travel or other expenses related to his or her sporting activity, would still be classed as an amateur. To clarify the difference between amateurs and professionals, the Court has added that athletes who do not receive payment for participating in tournaments, but have other sources of income through their sporting activity, such as grants or sponsoring agreements, will also be deemed to engage in an economic activity¹³⁷.

¹³³ Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] ECR 1035, at para 13.

¹³⁴ *Deliège*, at para 46.

¹³⁵ *Deliège*, at para 53, see also Case 196/87 *Steymann v. Staatssecretaris van Justitie* [1988] ECR 6159, at para 10.

¹³⁶ *Deliège*, at para 54, see also *Levin*, at para 17 and *Steymann*, at para 13.

¹³⁷ *Deliège*, at para 56.

1.3.4.1. Amateur Sport

The Court of Justice's statement in *Walrave* that "sport is subject to Community law *only* in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty"¹³⁸, has been widely understood in the sense that "true" amateur sport, where sport is practised solely as a hobby without any economic background, does not fall within the scope of Community law at all. This point of view has found support between scholars¹³⁹ and is shared by the Commission, according to which leisure activities are "in no way affected by the Treaty"¹⁴⁰. Having acknowledged that it can only act in respect of discrimination related to professional sports, the Commission did however stress the importance of sport in modern life and expressed its concern over nationality discrimination in the field of amateur sports, regarding it contrary to the spirit of a people's Europe¹⁴¹.

Up until now, in all cases concerning the validity of sporting rules under EC law, the Court exclusively had to deal with provisions applying to professional sport. While it is undisputed that in order to be protected by the Treaty freedoms, an individual would usually have to be engaged in an economic activity, it may be doubted whether the Court meant to exclude athletes who are not economically active from the scope of Community law altogether. Support for this view can be found in Advocate-General Trabucchi's opinion in *Donà*, who thought it possible that migrant workers and their family members might be protected from discrimination on grounds of nationality when joining a sports club in the host country to play as amateurs. Unfortunately, he declined to give an opinion on the matter, as the case in question was only concerned with the free movement of professional players¹⁴².

¹³⁸ See *Walrave*, at para 4; reaffirmed in *Bosman*, at para 73 and *Deliège*, at para 41; In *Donà*, at para 12, however, there seems to be a difference in the German version of the judgment, where the "only" is missing, which gave rise to discussion between German writers, see Zuleeg, M., "Der Sport im Europäischen Gemeinschaftsrecht" in Will, M. (ed), *Sportrecht in Europa* (C.F. Müller, Heidelberg, 1993), p. 1; Streinz, R., "Die Auswirkungen des EG-Rechts auf den Sport", (1998) 1 SpuRt, p. 6.

¹³⁹ See Klose, M., *Die Rolle des Sports bei der Europäischen Einigung* (Duncker & Humblot, Berlin, 1989), p. 86.

¹⁴⁰ Answer to written question by MEP Müller, concerning discrimination on grounds of nationality in the matter of access to fishing waters for hobby anglers; OJ 1974 C 58/1.

¹⁴¹ See answer to written questions by MEP Müller, OJ 1974 C 58/1 and by MEP Galle, OJ 1991 C 63/43, regarding the requirements of the Royal Belgian Tennis Federation which discriminate against non-Belgian nationals.

¹⁴² AG Trabucchi in *Donà*, p.1346.



A basis for the protection of amateur athletes could arguably be found in Article 7(2) of Regulation 1612/68¹⁴³ which shall ensure that migrant workers and specified family members¹⁴⁴ are granted the same social and tax advantages as nationals of the host nation¹⁴⁵. Although the Court had initially interpreted the concept of “social advantages” quite narrowly, deciding that it related only to benefits connected with employment¹⁴⁶, it went on to adopt a broader approach “in view of the equality of treatment which the provision seeks to achieve”¹⁴⁷ and held all social advantages to be included, “whether or not attached to the contract of employment”¹⁴⁸. The rationale behind this provision is to encourage the movement of workers within the EU and facilitate their integration in the host country. In order to determine whether workers are entitled to a particular benefit in another Member State under Article 7(2) of Regulation 1612/68, three factors are decisive: their status as a worker, their residence in the national territory and the suitability of the benefit to facilitate their mobility within the Community¹⁴⁹.

Considering the fact that more than half of EU citizens regularly practice sport, a high number of them in one of the 700 000 clubs existing in the European Union¹⁵⁰, it may be assumed that for a lot of migrant workers and their families sport is an important factor in daily life and they would want to join a sports club in the host country and compete for it. Excluding amateur athletes from competitions by reason of their nationality discourages them from joining a sports club and therefore makes integration in the host country more difficult, which has a negative effect on mobility within the Community. Consequently, amateur sports competitions should

¹⁴³ OJ 1968 L 257/2.

¹⁴⁴ According to Article 10 of the Regulation the family members who have the right to install themselves with a worker who is employed in another Member State, provided the worker has adequate housing available are: the spouse of the worker and descendants who are either under 21 or dependent, and dependent relatives in the ascending line of the worker and spouse. Member States are also required to facilitate the admission of other family members who are either dependant on the worker or living under the worker’s roof in the Member State of origin. However, Regulation 1612/68 will be replaced by Council Directive 2004/38/EC, see point 3.3.2.3 below.

¹⁴⁵ See also Streinz, R., *op. cit. supra note 138*, p. 6; Zuleeg, M. in Will, M. (ed), *op. cit. supra note 138*, p. 6.

¹⁴⁶ Case 76/72 *Michel S. v. Fonds National de Reclassement Handicapes* [1973] ECR 457.

¹⁴⁷ Case 32/75 *Fiorini (née Cristini) v. Société Nationale des Chemins de Fer Français* [1975] ECR 1085, at para 13.

¹⁴⁸ *Ibid*, at para 13.

¹⁴⁹ Case 207/78 *Ministère Public v. Even and ONPTS* [1979] ECR 2019, at para 22.

¹⁵⁰ See the “Helsinki Report on Sport”, *op. cit. supra note 23*, p. 3.

be opened to all EU citizens who work and live in another Member State and to those family members specifically listed in Regulation 1612/68.

However, even if the right to join and compete for a club in another Member State did not constitute a social advantage in the sense of Article 7(2), it would still seem disproportionate that an EU citizen would be able to practise a sport professionally throughout the Community, but could be prevented from competing in an amateur competition in another Member State. Furthermore, most professional athletes have been members of amateur clubs for which they will have participated in competitions before turning professional. This means that a young athlete who is resident in another Member State and wants to take up sport professionally, would not be given the chance to compete for a club at an amateur level; this would make it very difficult to find a club which would employ him or her on a professional level. Given that nationality discrimination for amateurs may hinder a young athlete from becoming a professional (as which he would be protected by Community law), it could be argued that in such cases amateur sport may be caught by Article 39.

Another scenario in which amateur sport could come under the scope of Community law are transfer restrictions, whereby clubs demand a reimbursement for fees incurred for the training of amateurs who are planning to move to a professional club. Undoubtedly, transfer fees for amateurs are capable of impeding a person's choice of profession, which means that amateurs on their way to becoming professionals should be protected by EC law in this respect¹⁵¹.

Be that as it may, up to this date the Court did not have the chance yet to decide on a sports case involving amateur athletes. However, it only seems a matter of time until the first amateur sportsman or sportswoman will arrive in Luxembourg to challenge the rules of the relevant sporting associations¹⁵².

¹⁵¹ See also Schimke, M., "Anmerkung zu RA-Entscheidung-Nr 01/98 des Deutschen Basketball Bundes vom 20.5.1998", (1998) 5 SpuRt, p. 209; against, however the decision of the Amtsgericht Frankfurt from 10.11.97, Az 31 C 3138/97-23, which considered the requirement of a training compensation payment of £ 750 for a twelve year old player as legitimate.

¹⁵² This could be sooner than expected: the Commission is currently investigating the case of a German national who has challenged a rule by the Spanish Football Association preventing him from playing in a Spanish amateur league. The Commission is said to be basing its investigation on the fact that the access to amateur sport may be considered as a social advantage in the sense of Article 7(2) of Regulation 1612/68, see Friedmann, T., "EU-Sportrecht aktuell", (2005) 1 SpuRt, p. 18.

1.4. THE CASE FOR A REFERENCE TO SPORT IN THE TREATY

Although the Court had confirmed the application of Community law to sport over 20 years before *Bosman*, it was mainly after this decision that the issue of an inclusion of sport in the Treaty arose. However, it took almost a decade since the famous sports judgment of the Court of Justice until sport finally found its way in Article III-282 of the Treaty establishing a Constitution for Europe. Although the reference to sport in the constitution is a significant development in the relationship between sport and EC law, it should not be forgotten that at this point in time the ratification of the Constitution by the Member States is far from being certain, to say the least¹⁵³. Thus, the fact that the constitution as signed in Rome in October 2004 may never come into force means that the chapter of a sports article cannot be closed as yet and other options for a reference to sport in the Treaty might still be possible.

1.4.1. A General Exemption for Sport?

In view of the Treaty establishing a Constitution for Europe that provides for limited Community competence on sporting matters, the possibility that the Member States would ever agree on exempting sport even partially from the scope of the Treaty is merely hypothetical¹⁵⁴. However, considering that European sports organisations have strongly lobbied for years to have the sporting sector exempted from the Treaty, it shall be demonstrated why the Member States were right to reject such a proposition.

Although general exemptions of specific subject matters are not unheard of in Community law, they are rare and should be interpreted restrictively. Examples are

¹⁵³ At the moment (December 2005) the situation looks rather grim, as referendums in France and the Netherlands have turned out negatively, while other Member States such as the UK have decided to postpone the planned referendums.

¹⁵⁴ In this respect see also the speech by Commissioner Viviane Reding, “2004 – A New Lease of Life for European Sport?”, delivered on 16.9.2003 in Monaco, SPEECH/03/411: “it is illusory to think that the Community dimension in sport can be made to disappear by including an exemption clause for sport in the future Constitution of the European Union. This subject was debated three years ago and none of the EU’s Heads of State or Government wanted an exception to be made for sport.”

Article 39(4), stating that the rules on free movement of workers do not apply to employment in the public service¹⁵⁵, or the exception for activities connected with the exercise of official authority from the freedom of establishment, provided for in Article 45 of the Treaty. Considering the economic significance of sport in Europe, it is commonly acknowledged that a complete lack of Community supervision over sporting rules is not an acceptable option¹⁵⁶.

Even a partial exemption of sporting matters from Community law (for example by adopting a Treaty article akin to the above mentioned Article 39(4) in order to render the provisions on free movement of persons and/or services inapplicable) would have highly undesirable effects. Taking into account that all of the Court's sports judgments to date were concerned with conflicts between the rules of sports associations and the free movement of workers or services, the significance of those Treaty articles in relation to sport is evident. A provision that removes sport from the scope of Article 39 would leave professional athletes largely without the protection of Community law, an effect that cannot be justified by the sport bodies' right to self-governance.

Community law not only affects sport in connection with the provisions on free movement, but also when it comes to the application of competition law. Having said that, the Commission has made it clear that a general exemption from EC competition law for the sports sector would be considered as "unnecessary, undesirable and unjustified"¹⁵⁷. However, following the example of the American baseball exemption¹⁵⁸ and the German § 31 GWB¹⁵⁹ which states an exemption for

¹⁵⁵ Examples for the narrow interpretation of the exemption in Article 39(4) are Case 149/79 *Commission v. Belgium* [1980] ECR 1881 and Case 66/85 *Lawrie-Blum v. Land Baden-Württemberg* [1986] ECR 2121.

¹⁵⁶ See for example the Resolution on the broadcasting rights of major sport events by the Committee of the Regions, COR 183/97 fin, 17-18 September 1997; see also speech Van Miert, K., "Sport et concurrence: Développements récents et action de la Commission", Forum Européen du Sport, Luxembourg, 27.11.1997, available at http://www.europa.eu.int/comm/competition/speeches/text/sp1997_069_fr.html.

¹⁵⁷ See speech Schaub, A., "EC Competition Policy and its Implications for the Sports Sector", World Sports Forum, St Moritz, 8.3.1998, available at http://www.europa.eu.int/comm/competition/speeches/text/sp1998_011_en.html.

¹⁵⁸ See the decision of the US Supreme Court, *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922), reaffirmed in *Toolson v. New York Yankees*, 346 U.S. 356 (1953) and *Flood v. Kuhn*, 407 U.S. 258 (1972).

¹⁵⁹ Gesetz gegen Wettbewerbsbeschränkungen [Law against Restrictions on Competition], BGBl I 1998/2521.

the central marketing of football television rights from national competition law, there have been demands for the insertion of a Treaty article excluding sport from the application of EC competition law. One argument for a provision is the protection of the social features of sport, feared to be threatened by the application of the economically orientated competition rules. The more significant basis for an exemption from competition law, though, is argued to be the unique characteristics of the sports market which are claimed to distinguish sport from other economic sectors, an issue which will be dealt with in chapter 5 on Article 81.

When the status of sport in EC law is analysed, one is tempted to agree with the sports bodies that the European Union should pay more attention to the special features of sport and help to protect its social values by showing more flexibility when dealing with sporting issues. However, it has to be pointed out that it was only after sport turned into big business, a development initiated and pushed ahead by the sports sector itself, that the Community felt it had to get involved, as sporting rules acquired more and more of an economic dimension. Sport undoubtedly has special characteristics distinguishing it from other economic sectors; still, taking into account the vast amount of money involved in sports nowadays, so far the sports associations have failed to provide the evidence that the differences are as such as to warrant a general exemption from certain Treaty articles, or even from Community law as such¹⁶⁰. Despite the fact that there is room to argue that Community law is in danger of destroying the existing structures of sport, making it impossible for the individual associations to protect its social and cultural value, a removal of sport from the scope of the Treaty would definitely go too far.

The Court¹⁶¹ and the Commission¹⁶² have repeatedly pointed out that sporting rules intended to secure certain goals such as the promotion of youth sport or the balance between clubs may be accepted under Community law. Having said that, the claim that an evasion from the law is the only possible way to safeguard these goals is not convincing. Since there are other means to pursue what has been acknowledged by the Community as legitimate sporting aims, one should be very

¹⁶⁰ See also Vieweg, K., in Caiger, A. & Gardiner, S. (eds), *op. cit. supra note 110*, p. 105; Streinz, R., *op. cit. supra note 138*, p. 96.

¹⁶¹ See for example *Bosman*, at para 106.

¹⁶² The Helsinki Report on Sport, *op. cit. supra note 23*, p.7.

wary of setting a precedent by excluding a whole business sector from the scope of European law.

1.4.2. A Treaty Article on Sport

In the past, different interest groups and institutions have called for the introduction of sport into the Treaty. Evidently, the views on the scope a sports article should entail differed significantly: whereas the sports organisations lobbied for an exemption of sport which would secure their right to self-governance and reverse the effects of *Bosman*, other institutions such as the European Parliament urged the Member States to create a legal base for taking into account the special features of sport when applying Community law to sporting matters. Additionally, there have been calls for an inclusion of sport in the Treaty which would allow the Union to carry out supporting and co-ordinating action, thereby opening up the possibility to allocate funds in the budget, without limiting the scope of application of the Treaty or interfering with the competences of the Member States.

The European Union has slowly developed its attitude to sporting matters from a purely regulatory to a more socio-cultural approach, expressing a willingness to take into account the particular characteristics of sport when acting upon sporting matters. However, in the absence of a reference to sport in the Treaty and bearing in mind that both the Amsterdam and the Nice declarations on sport are not legally binding, it is evident that such special treatment of the sports sector has been difficult to justify. Hence, the European sports organisations¹⁶³, as well as the European Parliament¹⁶⁴ have demanded repeatedly to have sport included in the Treaty¹⁶⁵. Moreover, at an informal meeting of sports ministers, which took place in Almeria in May 2002, eleven of the then fifteen EU Member States expressed their support for the inclusion in the treaties of an article on sport. Although it comes as no surprise

¹⁶³ See for example the UEFA brochure “A vision for European Sport: The case for a Sports Protocol”, available at http://europa.eu.int/futurum/forum_convention/documents/contrib/socio/0446_c_en.pdf.

¹⁶⁴ See EP Pack Report, *op. cit. supra note 48* and the Draft Opinion of the Committee on Culture, Youth, Education, the Media and Sport on the Treaty of Nice, *op. cit. supra note 68*.

¹⁶⁵ However, it should be noted that scholars have been divided on the issue, in favour of the introduction of a sports article: see Scholz, R. & Aulehner, J., *op. cit. supra note 80*, p. 47; against see Streinz, R., *op. cit. supra note 138*, (1998) 3 SpuRt, p. 96; Plath, K., *Individualrechtsbeschränkungen im Berufsfußball* (Duncker & Humblot, Berlin, 1999), p. 238.

that especially after *Bosman* the calls for a sports article increased, it should be noted that the issue had been a matter of discussion even before the judgment, for example in connection with the Maastricht Treaty¹⁶⁶.

The European Union is argued to have concentrated on professional sport as an economic activity and to have paid scant attention to the cultural, educational and social dimension of sport. This neglect is thought to stem from the fact that there is no explicit reference to sport in the Treaty that recognises the specific nature of sport and the autonomy of the sports movement¹⁶⁷. Such a provision would indeed clarify the competences in the sports sector on a Community level, whilst ensuring that the interests of sport are effectively taken into account when the Community is acting upon other subject matters. Although the European Union undoubtedly started to realise the social importance of sport, acknowledging that there are certain features of sport that are worth protecting, there is no overall concept in Community law as to how a conflict between sporting rules and the Treaty is to be resolved. Whereas it is evident that professional sport is an economic activity and as such cannot be exempted from EC law, it is nevertheless necessary to find a balance between the mainly economically motivated aims of the Treaty and the social and cultural values of sport. An explicit reference to sport in the Treaty could help to ease the tension by establishing a legal obligation that certain sporting interests have to be taken into account when applying Community law. Furthermore, the Amsterdam Declaration on Sport should be hardened by giving the sports interest groups the right to be heard in the preparatory stages of legislation which affects them or when other sports issues are at stake. This would not only enable the sports bodies to voice their concerns, but could improve communications with the European Union. A formalisation of the consultation process would strengthen the co-ordination between the Community and the sporting world and would help to identify problematic issues arising in connection with the application of EC law to sporting matters and to find solutions that are acceptable for both parties.

¹⁶⁶ See "Aufstieg des Sports in die europäische Vertragsliga?", *Aktuelles Stichwort* (1994) 6 SpuRt, p. 229; also, during the 1995 European Sports Forum in Brussels there was broad consensus between the sports representatives that sport should be recognised in the Treaty.

¹⁶⁷ See EP Pack Report, *op. cit. supra* note 48, point J.

The sports associations should be aware, however, that a reference to sport in the Treaty is more likely to serve as a foundation to widen Community competence, instead of narrowing it down. Thus, it is more likely that an article on sport would be introduced in order to regulate the sports sector rather than as an escape clause for top-class sport from EC law. This stands in contrast to the aims of the European sporting groups that demand a reference to sport in the Treaty in order to restrict Community involvement in Sport, particularly ruling out harmonisation¹⁶⁸.

The fact that sport is not included in the Treaty is not only significant with regard to sports associations and their internal rules, but also when it comes to Community action itself. Without a reference in the Treaty, there is no legal base for sport to be allocated any funds in the annual budget, a fact that has been heavily criticised by the European Parliament throughout the years¹⁶⁹. So far, sport has never been mentioned on its own merits but as a means of implementing other policies. In 1997, for example, the Community budget included Article B3-305 which was devoted to a pilot programme entitled “Sport in Europe” with an allocation of what was then 3 million ECU in commitment appropriations to finance the Eurathlon Programme and to provide funds for developing sport for the disabled. However, this article was included in the chapter entitled “Information and Communication”, indicating that sport was merely seen as a means of communication, rather than taking into account its full social dimension¹⁷⁰. This example shows that every year the European Parliament has to bring forward new arguments for the inclusion of resources for sport in the budget, trying to accommodate sport under existing articles. Hence, in order to develop an overall approach to sport that actively promotes sport’s social and cultural side within the European Union, the Member States should grant sport a legal base to have it enclosed in the Community budget.

¹⁶⁸ See the statement of Marlis Rydzy-Götz, Secretary General of the ENGSO at the Public Hearing to the 1996 IGC, available at http://www.europarl.europa.eu/hearings/igc2/doc22_en.htm.

¹⁶⁹ EP Pack Report, *op. cit. supra note 48*, point U; see also the EP discussion in the sitting of 12.6.1997, point 7, “EU Role in Sport”, speeches of MEPs Pack, Hawlicek, Larive and others, see <http://www.europarl.europa.eu/pv2/pv2?LISTING=AfficheTout&PRG=CALDOC&FILE=970613&LANGUAGE=EN&TPV=DEF#Title10>.

¹⁷⁰ In the budget for 2003, sport was represented under the title “Education, Vocational Training and youth”, namely point B3-1004 “European Year of Education through Sport” and point B3-1026 “Sport: Preparatory Measures for a Community Policy in the Field of Sport”. Both points re-appeared in the 2004 and 2005 budget (point 15 0504 and 15 0503 under the title “Education and Culture”).

Having said that, it should be noted that a reference to sport in the Treaty may open up the possibility to allocate funds for certain sports programmes, but does not necessarily establish exclusive Community competence. As the Constitution shows, an agreement could be found on a sports article giving the Union the possibility to support and co-ordinate actions of the Member States, but the Member States are evidently reluctant to give up their legislative powers in sporting matters or to introduce an article which limits the application of the Treaty to professional sport.

1.4.3. The Article on Sport in the Constitution

Despite the fact that during both the 1996 and 2000 Intergovernmental Conferences the introduction of a reference to sport in the Treaty was considered, to the disappointment of many neither the Amsterdam nor the Nice Treaty contained a provision on sport; in both cases, the Member States opted for non-binding declarations instead. As a result, before the start of the 2004 Intergovernmental Conference sports officials were preparing for another attempt to secure a legal base for sport in the Treaty¹⁷¹. However, considering the fact that the past two Intergovernmental Conferences, despite fierce lobbying from sports interest groups, as well as the European Parliament, had not chosen to include a sports article, it seemed unlikely that the Member States would reach a unanimous agreement on the introduction of a sports article this time. Moreover, in view of the more important issues at stake, namely the integration of the Charter for Fundamental Rights, the composition of the institutions and the decision-making procedures, one would not have expected that sport would be high on the Intergovernmental Conference's

¹⁷¹ See the UEFA resolution calling for a legal framework for sport in the new Constitution, adopted at the 27th Ordinary UEFA Congress in Rome in March 2003, in this context the speech of UEFA's vice-president Per Ravn Omdal at the Congress is particularly interesting, as he stressed that "this is not about obtaining an exemption from EU or national law. We are not and should never be above the law. What we do need is a greater legal certainty", see <http://www.uefa.com/news/newsId=61737,printer.htm>; see also the contributions of the International Olympic Committee and the European Non-Governmental Sports Organisation, an umbrella organisation of national sports bodies, to the Convention preparing the 2004 Intergovernmental Conference, see Parrish, R., "The Birth of European Union Sports Law", 2(2) 2003 Entertainment law, p.25. However, not all sports organisations seemed to have been in favour of a Treaty article establishing a legal base for Community action on the sports sector, see the speech by Commissioner Reding, *op. cit. supra* note 154, "... certain sports federations have sought to put pressure on governments in the hope that provisions are included in the Treaty with a view to reducing the EU's role".

agenda. Thus, it came as a surprise to many that the provisional consolidated version of the Treaty establishing a Constitution for Europe, as approved by the Intergovernmental Conference on 18 June 2004, included a reference to sport.

The Constitutional Treaty mentions sport (and in particular its educational and social function) in Article III-282; also, Article I-17 includes sport among the areas in which the Union may take supporting, coordinating or complementary action. These provisions are as follows:

SECTION 5

EDUCATION, YOUTH, SPORT AND VOCATIONAL TRAINING

Article III-282

1. The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and complementing their action. It shall fully respect the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

The Union shall contribute to the promotion of European sporting issues, *while taking account of its specific nature*, its structures based on voluntary activity and its social and educational function.

2. Union action shall be aimed at:

- (a) developing the European dimension in education, particularly through the teaching and dissemination of the languages of the Member States;
- (b) encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study;
- (c) promoting cooperation between educational establishments;
- (d) developing exchanges of information and experience on issues common to the education systems of the Member States;
- (e) encouraging the development of youth exchanges and of exchanges of socio-educational instructors and encouraging the participation of young people in democratic life in Europe;
- (f) encouraging the development of distance education;
- (g) developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports,

and by protecting the physical and moral integrity of sportsmen and sportswomen, especially young sportsmen and sportswomen.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the field of education and sport, in particular the Council of Europe.

4. In order to contribute to the achievement of the objectives referred to in this Article,

(a) European laws or framework laws shall establish incentive actions, *excluding any harmonisation of the laws and regulations of the Member States*. They shall be adopted after consultation of the Committee of the Regions and the Economic and Social Committee;

(b) the Council, on a proposal from the Commission shall adopt recommendations.

Article I-17: Areas of supporting, coordinating or complementary action

The Union shall have the competence to carry out supporting, coordinating or complementary action. Such action shall, at European level, be:

[...]

education, youth, sport and vocational training

1.4.3.1. A Community Competence in Sport?

It appears that the heads of state and government of the European Union have finally agreed to have a reference to sport inserted in the Treaty. However, provided the Constitution will be ratified by the Member States, what does this newly established Union competence in sporting matters entail? First of all, Article I-17 makes clear that the Union shall only have the competence to carry out supporting, coordinating or complementary action. This does not provide for a legal base enabling harmonisation of the laws and regulations of the Member States, a fact which is explicitly mentioned in paragraph 4(a) of Article III-282. Nor will the new Article on sport grant the Union the right to interfere with the autonomy of the sports bodies.

The most important effect of the reference to sport is definitely that it opens up the possibility to include sport in the budget and enables the Union to finance

projects in the areas referred to in Article 282(2)(g) of the Constitution¹⁷². Taking into account that sport has been inserted into the Treaty alongside education, youth and vocational training¹⁷³, the focal point of Union activity will obviously lie in the encouragement of the educational and social values of sport in European society. Hence, the new Article on sport will allow the Union to continue the development started by the European Year of Education through Sport. This includes the promotion of Community programmes with the aim to encourage young people to practice sport by enhancing co-operation between sports and educational institutions or to support voluntary work in the field of amateur sport. Moreover, the fact that the promotion of fairness and openness in sporting competitions and the protection of the physical and moral integrity of athletes is mentioned, offers a legal base to continue the battle against doping in professional and amateur sport. The reference to the European dimension of sport suggests that the Union has finally recognised the integrationist function of sport and it is possible to imagine that projects will be initiated with the view to use sports as a means not only to bring people from different Member States together, but also to further the integration of the socially disfavoured and the handicapped in European society. Apart from that, it has to be welcomed that co-operation between sports bodies is cited as an aim for Union action. Thus, the Union will hopefully establish a framework for a dialogue with European sports bodies in order to co-ordinate joint action on the field of youth and amateur sport or anti-doping measures; this may also help to start a process of reconciliation, improving the co-operation on other, more sensitive issues, such as the application of Union law to professional sport.

Undoubtedly, the positive impact of the new sports article on European sport is considerable, as it finally enables the Union to finance sports projects and to develop a sports policy that promotes the social, cultural and educational benefits of

¹⁷² However, in an open letter from June 2004, published on the Commission's sport website, Commissioner Reding has implied that it is not realistic to think that concrete support measures based on Article 282 will be in force before 2008/09 (that is, if the Constitution will indeed be ratified by the Member States), available at: http://www.europa.eu.int/comm/sport/action_sports/article/docs/200407article-vr.pdf.

¹⁷³ The working paper on the Treaty does not offer much insight into why it was decided to add a specific reference to sport in Article 149 on education and youth, the Presidium merely comments that "it seems appropriate to do so [...] as sport constitutes part of this wider area", see CONV 727/03 "Draft section of part three with comments", p. 109, available at <http://register.consilium.eu.int/pdf/en/03/cv00/cv00727en03.pdf>.

sport. However, the reference to sport in the Constitution has done nothing to remove the existing confusion surrounding the application of Community law to professional sport. Although paragraph 1 of Article III-282 provides that the “Union shall contribute to the promotion of European sporting issues, while taking account of its specific nature, its structures based on voluntary activity and its social and educational function”¹⁷⁴, this does not constitute an obligation to recognise sporting values when assessing sporting measures under EC law. This has been made clear in paragraph 2, where the possible areas for Union action are outlined. Evidently, the Member States feared that a provision granting sport preferential treatment under the rules on free movement or competition would be used as a get-out clause for sports associations and would set a negative precedent for other industries.

Having said that, in a contribution to the Secretary-General of the Convention, a number of members and alternate members of the Convention have expressed their concerns about the fact that by reason of the economic developments in the sports sector and the approach adopted by public authorities, as well as sporting organisations, it may not be possible to safeguard the existing structures in sport or its social function¹⁷⁵. Additionally, it was pointed out that the recent multiplication of legal proceedings in the sport sector has been caused by legal uncertainty concerning the application of Community law to sport. Thus, the members of the Convention suggested mentioning certain objectives in the Treaty to define the scope of Community intervention, namely the recognition of the role and independence of the current structures of the European model of sport, the promotion of social and educational values, co-operation between public powers and the sports movement on all levels, the battle against doping and co-operation with third countries and international sporting organisations.

Admittedly, less risks are involved in continuing the soft-law approach and it has to be emphasised that the principle that sport, when practiced as an economic

¹⁷⁴ It is interesting to note that the phrase “while taking account of its specific nature, its structures based on voluntary activity and its social and educational function” was not included in the first draft, but added at a later stage, see Documents from the Presidency the Delegations (CIG 81/04) - Meeting of Heads of State or Government, Brussels, 17 and 18 June, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/misc/81000.pdf.

¹⁷⁵ See CONV 478/03 “Contribution aux travaux de la Convention Européenne sur la place du sport dans la future traité”, 10 January 2003, available at <http://register.consilium.eu.int/pdf/en/03/cv00/cv00478en03.pdf>.

activity, is covered by the Treaty must not be undermined. Still, one cannot help but wonder whether the Member States have missed an opportunity to clarify the existing insecurities over the application of EC law to sport and to ensure that sporting values are preserved and not endangered by Community intervention.

1.4.3.2. A Protocol on Sport

Despite the fact that it may be doubted whether the Member States will ever agree on a provision granting sport special treatment under Community law, it is still worthwhile to examine the available options for how such a venture could be realised. An alternative to including a reference to sport in the Treaty itself would be the annexation of a protocol on sport¹⁷⁶. The protocol idea is not new and has been used in connection with other issues, such as the Social and the Schengen Protocols, where the Member States were unable to reach an agreement on joint Community action and certain countries were allowed to opt-out. Other examples include the Maastricht Danish Second Homes Protocol, which provides an exemption from the Treaty freedoms, and the controversial Barber Protocol that was attached to the Treaty in order to limit the effect of the Court's judgment in the *Barber* case¹⁷⁷. In all those cases, the practice of annexing a "special interest" protocol allowing derogations from Community law to the Treaty has been heavily criticised¹⁷⁸: whereas the Social Protocol was argued to set a precedent for a Europe "à la carte", threatening the unity and cohesiveness of the European legal order¹⁷⁹, the Danish Second Homes Protocol has enabled certain industries to claim special status. The Barber Protocol, on the other hand, was criticised for undermining the Court of Justice's authority by trying to overrule the effects of a judgment. The above mentioned examples of protocols which were attached to the Treaty on different occasions give an indication how a sports protocol could be used to realise the idea of a Community sports policy. According to Article 311, a protocol annexed to the Treaty forms an integral part thereof, which would make it possible to use a Treaty

¹⁷⁶ EP Pack Report, *op. cit. supra* note 48, point K; see also the suggestion of MEP Doris Pack in the above mentioned EP discussion.

¹⁷⁷ Case 262/88 *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

¹⁷⁸ See Curtin, D., "The Constitutional Structure of the Union: A Europe of Bits and Pieces", (1993) 30(1) CMLR, p. 44.

¹⁷⁹ *Ibid*, p. 52.

protocol in order to apply certain exemptions to sport. Thus, the Member States could take particular sports out of the scope of the Treaty, or except certain restrictive practices, such as the collective marketing of sports television rights. Following in the footsteps of the Barber Protocol, a protocol on sport could also be a welcome opportunity for those who wish to limit the effects of the *Bosman* ruling. However, it has already been pointed out that it is highly unlikely that the Member States would agree to grant sport major exemptions from Community law¹⁸⁰. Having said that, the ongoing discussions about the re-introduction of nationality restrictions show that there are still isolated issues where the Member States might be tempted to find a political solution to accommodate certain peculiarities of the sports sector.

1.4.3.3. Reference to Sport under Existing Treaty Articles

1.4.3.3.1 Article 151 - Culture

The third option of giving sport a legal base in Community law, besides a separate Treaty article or a sports protocol, would be to include a reference to sport under an existing Treaty article. Taking into account the previously mentioned cultural significance of sport, the obvious choice would be the addition of a paragraph comparable to Article 151(4) to the article on culture, establishing an obligation for the Community to take sporting matters into account when acting under other Treaty articles. In this context it is important to note that if sport is argued to be a cultural activity to which Article 151(4) already applies, an additional paragraph on sport would obviously be unnecessary. However, an explicit reference to sport in Article 151 would settle the argument over the cultural nature of sport and ensure that its special qualities are protected. Besides, even those who deny sport any cultural characteristics, would have to admit that it is hardly in line with the idea of a “People’s Europe” that culture is mentioned in the Treaty, while sport, which is the much bigger movement in Europe and arguably has a lot more significance in the lives of the majority of people, does not have any recognition in the Treaty.

A reference under the existing article on culture would be an ideal compromise which recognises the cultural and social significance of sport, without

¹⁸⁰ In this context see Blackshaw, I., *op. cit. supra* note 70, p. 15, who doubts that “the political will or priority for a Sports Protocol exists”.

granting the sports sector extensive exemptions. This solution has found broad support in the European Parliament, which has been trying for years to have such a provision incorporated in Article 151, whereas the opinions between scholars differ¹⁸¹.

1.4.3.3.2 Article 39 – Free Movement of Workers

When it comes to the application of the Treaty freedoms to sport, it will usually be the rules on the free movement of workers which cause a conflict between sporting rules and Community law. In connection with possible justifications for the football transfer system in the *Bosman* case, the European Court of Justice has accepted that, “in view of the considerable social importance of sporting activities”, specific sporting interests, such as maintaining a balance between clubs, or the training of young players, are legitimate aims that may justify a restriction of the right to free movement¹⁸². However, although it has to be applauded that the Court has taken into account certain sporting interests, the scope for special treatment of sporting matters remains limited. Thus, there have been calls for the inclusion of sporting interests to the reasons of justification in Article 39(3) of the Treaty¹⁸³. Such a clause would confirm that sporting interests may in principle be used as a justification for rules restricting the free movement of workers, albeit under the condition that the means in question do not go beyond what is necessary to achieve the sporting aim. This would not only ensure that sporting interests are taken into account when applying EC law, but also improve legal certainty. However, in order to provide the sporting associations with guidelines as to which of their internal rules would be likely to be justified under Article 39(3), it would be necessary to clarify which sporting interests are considered as being legitimate under the Treaty.

1.4.3.3.3 Article 81 – Cartels

The application of the provisions on competition law to sport is still a very controversial area, a fact that is illustrated by the Court’s reluctance to rule on the matter, despite repeatedly having had the opportunity to do so¹⁸⁴. Although the

¹⁸¹ For: Scholz, R. & Aulehner, J., *op. cit. supra note 80*, p. 47; against: Plath, K., *op. cit. supra note 165*, p. 240; Streinz, R., *op. cit. supra note 138*, (1998) 3 SpuRt, p. 96.

¹⁸² See *Bosman*, at para 106.

¹⁸³ See for example, Plath, K., *op. cit. supra note 165*, p. 241.

¹⁸⁴ In this context, one need mention only the proceedings in *Bosman*, *Deliège* or *Lehtonen*.

special difficulties which arise in connection with the application of competition law to sport will be dealt with in depth later on, it is important to note at this point that it is unclear to what extent sporting interests may be taken into account under the mainly market orientated competition rules. Competition law generally does not take into account any social or public policy considerations and a distortion of competition may only be justified for economic reasons¹⁸⁵. Hence, particularly in connection with sport, the rules on competition law have been criticised for being too rigid and there have been demands to add a passage on sport to Article 81(3), allowing sporting interests to be considered when sports issues are examined under competition law¹⁸⁶. It shows that competition law is the area in Community law, where it is most difficult to accommodate sport in its capacity as social, as well as economic activity. The opening of the conditions for exemption in Article 81(3) to sporting considerations by inserting a reference to sport would undoubtedly make sport sit more comfortably within the system of competition law, as its special characteristics could be taken care of and be protected. Although the Commission has issued certain guidelines indicating which practices relating to sport might be accepted under the rules on competition¹⁸⁷, undertakings acting in the sports industry are often faced with the uncertainty whether an agreement to which they are party falls foul Article 81(1) or, if so, might merit an exemption under Article 81(3) of the Treaty. Moreover, considering the new competition regime replacing Regulation 17/62¹⁸⁸, which empowers national competition authorities and courts to issue exemptions, it remains to be seen how Article 81(3) will be applied to sporting rules in the future. Owing to the fact that there is little case law available to guide the national competition authorities, it will be difficult to achieve a consistent application of Article 81(3). Also, it may be assumed that the national courts and competition authorities are probably more susceptible to public pressure and might be tempted to

¹⁸⁵ However, as will be explained in chapter 5, the new case law in *Wouters* has given rise to discussions as to whether social interests may be taken into account under Article 81(1).

¹⁸⁶ See for example, Plath, K., *op. cit. supra* note 165, p. 241.

¹⁸⁷ See for example press release IP/99/133 "Commission debates Application of its competition Rules to Sports", 24.2.1999.

¹⁸⁸ Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1, replacing Council Regulation No 17 of 6 February 1962, First regulation implementing Articles 85 (now 81) and 86 (now 82) of the Treaty, OJ 1962 13/204.

stretch the scope of Article 81(3) to accommodate sporting interests. Although a reference to sport under Article 81(3) would provide clarity in this respect, it has to be taken into account that such a clause would set a precedent for other industries arguing that they too support a socially important cause which is worth protecting. Also, considering the very narrow scope of Article 81(3) inasmuch as it is limited to economic grounds, it probably would be going too far to insert a reference to sport while other (possibly more important) social, cultural or educational considerations could not be raised in competition law proceedings.

Another suggestion brought forward in connection with the application of Article 81(3) to sporting matters is to adopt guidelines in a block exemption for certain agreements in sport¹⁸⁹. As is commonly known, the Commission has established block exemptions with regard to certain types of agreements containing particular terms when it has acquired sufficient experience with individual agreements in order to prevent a large number of applications for individual exemptions. In view of the considerable amount of sports cases that have been brought before the Commission in the past, a block exemption for certain agreements in sport, such as agreements relating to sports broadcasting rights or measures establishing a sporting equilibrium would be imaginable and could be a good solution to provide more legal certainty in the sports sector.

1.4.3.3.4 Article 82 – Monopolies

Although sports related issues will generally be more relevant to Article 81, it should be noted that the monopolistic organisation of sports associations in Europe might bring sporting matters under the scope of Article 82 of the Treaty. This has become particularly evident in connection with the discussions surrounding the establishment of a European Super League, comprising high profile clubs from national leagues around Europe. Additionally, the fact that sports associations have the absolute power to regulate the admission or exclusion from sporting competitions may be of relevance under Article 82. Again, it is questionable whether a reference to sport in Article 82 would be desirable, considering the precedent set for other industries. Also, it is important to note that Article 82 does not condemn monopolies as such,

¹⁸⁹ See “The Balance between the Game and the Money”, appendix in Caiger, A. and Gardiner, S. (eds), *op. cit. supra* note 91, p. 350.

but only applies when the monopoly status on the market is abused. However, the recent example of SC Charleroi's challenge of FIFA's rule that clubs must let their players leave on international duty (but are not reimbursed for damages incurred through a player being injured whilst playing for the national team) shows that Article 82 may definitely play a significant role when sporting measures are assessed.

1.4.3.3.5 Article 3 – Community Activities

Another suggestion of how to insert a reference to sport in the Treaty is the incorporation of sport in the list of Community activities outlined in Article 3 of the Treaty¹⁹⁰. Used in connection with Article 308, the “catch-all” article, this would enable the EC to act in sports matters if it proved necessary to attain one of the objectives of the Treaty. Acting unanimously, on a proposal from the Commission and after consulting the European Parliament, the Council of Ministers could take appropriate measures¹⁹¹. This would improve co-ordination mechanisms at Community level and establish the necessary legal base to implement an EU sports policy that actively promotes sport and its socio-cultural values. However, such a strategy could also provide the Community with the competence to regulate on sports related issues, which might not be in the interest of the sporting associations or the Member States for that matter. Moreover, the addition of sport to the list of Community activities would not ensure sport being taken into account under other EC policies or grant sport any special treatment in Community law, both of which are the main demands for a reference in the Treaty by the sports bodies.

¹⁹⁰ See Parrish, R., “Sport and the Intergovernmental Conference” (1997) 5(1) SLJ, p. 32.

¹⁹¹ EC Treaty, Article 308.

2. THE FOOTBALL TRANSFER SYSTEM

2.1. ORGANISATION OF FOOTBALL IN EUROPE

In line with the previously mentioned European model of sport¹, football is organised by a series of federations and associations, which form a pyramid structure. At the bottom level are the clubs, joined together in national associations. With the exception of the United Kingdom, where, for historic reasons, England, Wales, Scotland and Northern Ireland have their own associations, there is only one association in each Member State². At an international level, the national federations are all part of the Fédération Internationale de Football Association (FIFA), an umbrella association which regulates football worldwide. According to Article 1 of its statutes, FIFA is an association within the meaning of Article 60 of the Swiss civil code and is based in Zurich. Article 9 of the FIFA statutes allows the national associations to link up to continental confederations and on a European level, the national football federations have united in the Union des Associations Européennes de Football (UEFA), an association governed by Swiss law and based in Nyon, Switzerland. UEFA, whose members include in particular the national associations of the Member States and the EEA contracting states, organises all European football competitions, as for example the European Championships, UEFA Champions League and the UEFA Cup.

The pyramid structure ensures that each federation is bound by the rules of the regulatory bodies above, which means that the national organisations in Europe are subject to the provisions of both FIFA and UEFA. Since the different football clubs are members of the national associations in question, they too fall under the regulatory power of these two international bodies. Although the international governing bodies lay down ground rules for the organisation of the game, football is principally co-ordinated by the national federations, which supervise professional, as well as amateur football. However, in some countries such as England or Scotland,

¹ See the Commission document, "The European Model of Sport", November 1998, available at http://www.europa.eu.int/comm/sport/doc/ecom/doc_evol_en.pdf.

² See Article 1(3) of the FIFA Statutes, with the exception for the UK provided for by Article 1 (4).

the highest division in the national league, e.g. the “Premier League” or the “Scottish Premier League” is organised by a separate legal body in addition to the national association and national competition is overseen by both.

2.2. PURPOSE OF THE TRANSFER SYSTEM

When examining the development and structure of the football transfer system, it is important to understand the reasoning behind the introduction of such regulations. Ever since the beginnings of professional football in the late 19th century, clubs aimed to control the movement of players and their wages. The transfer system was invented as a mechanism to ensure that clubs were able to protect their most valuable assets, the players. A football team consists of a group of individual players, each with a different responsibility within the game. In order to build a successful unit, it is necessary for the club to know which players are available and to be able to work with them over a given length of time, without incurring the danger of losing a player whenever he receives a better offer from another club or disagrees with the manager. Having said that, it could be argued that this situation is no different to any other employment relationship and thus, national legislation on contractual stability and breach of contract would in fact suffice. Still, the world of football has repeatedly emphasised the special circumstances in the football business, which are claimed to require additional protection for the clubs. Apart from regulating the movement of players, the football transfer system was also introduced to achieve a re-distribution of resources in the football business. Thus, the transfer system was intended to establish a certain financial and sporting balance between the clubs by placing restrictions on the richer clubs’ ability to poach players from smaller clubs, which could not match the bigger clubs’ wage structure³.

Despite the fact that the football transfer system has repeatedly been changed and more than hundred years have passed from its introduction to *Bosman*⁴, the arguments used to justify the transfer rules remained the same over the years.

³ See McArdle, D., “One Hundred Years of Servitude: Contractual Conflict in English Professional Football before *Bosman*”, (2000) 2 Web Journal, <http://www.webjcli.ncl.ac.uk/2000/issue2/mcardle2.html>.

⁴ Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v. Bosman and Others* [1995] ECR I-4921.

However, as commonly known, the Court did not accept that the transfer fees at issue in *Bosman* were vital to guarantee contract stability or a sporting equilibrium. Apart from not being convinced that the transfer rules were suitable to achieve the envisaged aims, the Court considered the transfer rules to be excessive, arguing that less restrictive means would have been available.

However, even though the Court ultimately rejected the arguments put forward by the football associations to defend the transfer system, it generally accepted that certain sporting interests, such as the need to ensure a sporting equilibrium, may be considered under the provisions on free movement. Thus, it will be necessary to examine to what extent sporting interests may be taken into account under EC law and whether there may be circumstances under which the aforementioned sporting aims could be used to justify restrictions put on players by transfer rules.

2.3. DEVELOPMENT OF THE FOOTBALL TRANSFER SYSTEM

2.3.1. England

The development of the football transfer system over the last hundred years is best illustrated by the example of the English rules. Not only was the English Football Association the first to introduce transfer regulations, but English courts have been involved in disputes over the transfer of footballers from as early as the 1890s⁵.

After the introduction of professionalism, the Football Association in 1885 quickly presented a regulatory system which required all players to be registered annually with the FA. In the early years of professional football, players were engaged for a year at a time and could move freely at the end of their contracts. However, they were not allowed to change clubs mid-season, unless their present clubs and the Football Association agreed⁶. Although the requirement of registration

⁵ See McArdle, D., *op. cit. supra* note 3.

⁶ See Caiger, A. & O'Leary, J., "The End of the Affair: The Anelka Doctrine – The Problem of Contract Stability in English Professional Football" in Caiger, A. & Gardiner, S. (eds.), *Professional Sport in the EU: Regulation and Re-regulation* (T.M.C. Asser Press, The Hague, 2000), p. 199.

with the FA constituted the basis for the later transfer and retain system, it was only after the foundation of the English League in 1888 that out-of-contract players were restricted in their movement. The League's officials, concerned that big teams which were able to offer higher salaries would dominate the new competition, decided to put restrictions on the richer clubs' ability to recruit players from smaller clubs⁷. As a consequence, from the beginning of the 1893/94 season, once a player had registered with a club, he was only allowed to move if his club gave permission, even if the contractual relationship had expired. The registration (and therefore the player) became a commodity that could be traded between clubs and players were effectively bought and sold like cattle⁸. However, given the fact that the introduction of the transfer system could not prevent the domination of the English League by a handful of teams, the other clubs searched for additional means to ensure an even spread of talent and in 1901, a maximum wage of £ 4 per week was introduced.

2.3.1.1. The *Eastham* Case

Over the next 60 years, the transfer system experienced little change and it was only in 1963 that a player called George Eastham, with the help of the player's union, successfully challenged the transfer rules and the maximum wage limit before the English courts. At the time of the *Eastham* case⁹, the majority of players were still on annual contracts, running from 1 July to 30 June. At the end of the contract, a player would find himself in one of the following positions: the club simply renewed his existing contract, the club placed the player on a transfer list at a fee fixed by the club, the club released the player without asking for a transfer fee or the club decided to retain the player¹⁰. The system required clubs to produce a list at the end of each season, declaring which players were available for transfer and which players the club intended to retain for the following season. A player on the retain list had no right to demand a transfer, even if the club offered him a contract on less favourable

⁷ See McArdle, D., *op. cit. supra* note 3.

⁸ Morrow, S., *The New Business of Football – Accountability and Finance in Football* (Macmillan Press, London, 1999), p. 31; see also Harding, J., *For the Good of the Game - The Official History of the Professional Footballers' Association* (Robson Books Ltd., London, 1991), p. 2, who describes the situation of a footballer at the time as that of "a bonded slave, a chattel, no better than a piece of merchandise".

⁹ *Eastham v. Newcastle United Football Club Ltd.* [1963] 3 All ER 139.

¹⁰ See Osborn, G. & Greenfield, S., *"Contract and Control in the Entertainment Industry: Dancing on the Edge of Heaven"* (Ashgate Publishing, Aldershot, 1998) p. 35.

terms. This meant that in case the player had rejected the offer, he could not sign for another club, unless the FA considered the offer to be too low. Players were allowed to petition to the FA with their reasons for requesting a move to another club, but if the FA refused to intervene, clubs could retain a player indefinitely. Consequently, even when the player ceased to be an employee of the club because he had been retained and rejected the offer of a new contract, the system prevented him from moving to another club. Similarly, a player on the transfer list could only take up alternative employment if he found a team willing to pay the transfer fee fixed by his old club. Since the clubs were under no obligation to pay a player's wages once the contractual relationship had ended, a lot of players had effectively no other choice than to quit the game¹¹.

The court in *Eastham* considered the system as a restraint of trade, since it prevented a player from obtaining employment with another club at a time when he was no longer an employee of his old club and thus, did not receive any wages. Additionally, the court provided an interesting comment on the argument that the retain-and-transfer system was in operation in all of the world's professional leagues which was supposed to prove that those who knew best considered it to be in the general interest of the game:

“The system is an employer's system, set up in an industry where employers have succeeded in establishing a united monolithic front all over the world, and where it is clear that for the purpose of negotiation the employers are vastly more strongly organised than the employees. No doubt the employers all over the world consider this system to be a good system, but this does not prevent the court from considering whether it goes further than is reasonably necessary to protect their legitimate interest”¹².

The decision led to a modification of the transfer system with the result that the maximum wage limit was abolished and a player was entitled to a free transfer if his club offered him a new contract on less favourable terms. Also, players on the

¹¹ See for example the case of Wilf Mannion, an English International whose club fixed the transfer fee at such an unrealistic price that he was unable to find a new club and left the game to sell chicken coops in Oldham; see the Evening Gazette, Special Edition, Saturday, 22 April 2000.

¹² *Eastham v. Newcastle Football Club Ltd* [1963] 3 All ER 139, at 150.

transfer list subsequently had to be paid and if a player felt the transfer fee had been set too high by his club, he could appeal to the FA and the matter went to arbitration. Despite the changes to the transfer system in England, the rest of Europe took little notice and most countries continued to use the old system until the *Bosman* case. It is ironic that had Bosman played for an English club, he would have been entitled to a free transfer since RC Liège offered him a new contract on worse terms than his previous one. Be that as it may, considering the rigorous restrictions that the transfer regulations put on the movement of players and the number of players who have been forced out of the game by clubs refusing to let them move at the end of their contracts, it is surprising that the system was not challenged earlier.

2.3.2. The FIFA Transfer Rules 1953 - 1997

Having explained the organisation of football in Europe, it becomes evident that there are three different levels of representation – FIFA, UEFA and the national associations. In its capacity as the worldwide regulatory body, FIFA adopted rules controlling the movement of players from one national association to another as from 1953. However, the different confederations were allowed to provide their own rules for the countries under their jurisdiction, whereas national associations were obliged to set up regulations for transfers effected within their jurisdiction.

2.3.2.1. The 1953 FIFA Transfer Regulations¹³

The 1953 FIFA transfer regulations provided for a system of players' registration, which still builds the basis for the existing transfer system. Each player had to be registered with a national association by which he was then granted the licence to play for a particular club. The power to decide on the status and licence of a player lay with the national associations and other associations, including FIFA, had to acknowledge this decision¹⁴. An international transfer was only possible if the former national association had issued a transfer certificate, confirming that a player was not bound by any contractual responsibilities with a club and all commitments of a

¹³ Last amended in 1986.

¹⁴ Article 1 of the 1986 FIFA transfer regulations; in the case of regulations which have been amended several times, reference will be made to the articles of the latest version.

financial nature, including transfer fees, had been settled¹⁵. Hence, no national association was allowed to register a player before it had received the international transfer certificate from his former national association¹⁶.

2.3.2.2. The 1991 FIFA Transfer Regulations¹⁷

The 1991 FIFA transfer regulations retained the requirement of an international transfer certificate. However, in the light of the proceedings in the *Bosman* case, FIFA introduced new rules, according to which the former national association could only refuse to issue the transfer certificate if the player in question had not fulfilled the contract with his old club or if there was a dispute over the player's transfer other than that of a financial nature¹⁸. In case the player's former association did not issue a transfer certificate within 60 days from the making of the request by the new association, the new association could issue a provisional certificate¹⁹. Alternatively, FIFA could order an association to issue a transfer certificate or adopt a decision, which would take the place of a certificate²⁰.

The 1991 transfer rules provided that if a professional player changed clubs, his former club was entitled to compensation for his training and/or development²¹. Regarding the transfer of an amateur player, as a result of which he lost his amateur status, his old club could demand compensation for his development²². However, the FIFA regulations additionally declared that disagreements concerning the amount of the transfer fee were not to have any influence on the player's sporting or professional activity. They also stated that in the case of such a dispute between two clubs, a transfer certificate could not be denied and the player was free to play for the new club as soon as the international transfer certificate had arrived²³. If the two clubs in question could not reach an agreement as to the amount of the transfer compensation, the issue could be submitted to FIFA for a decision²⁴. Apart from that,

¹⁵ Article 12(5).

¹⁶ Article 12(1).

¹⁷ Last amended in 1994.

¹⁸ Article 7(2) of the 1994 FIFA transfer regulations.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Article 14(1).

²² Article 14(2).

²³ Article 20(1).

²⁴ Article 16(1).

the FIFA rules allowed the confederations, such as UEFA to adopt their own regulations for settling disputes over transfer fees²⁵. With regard to domestic transfers, the national associations were obliged to provide their own system in accordance with the FIFA regulations, subject to approval by FIFA²⁶.

2.3.3. The UEFA Transfer Rules

2.3.3.1. The 1990 UEFA Transfer Regulations

In May 1990, UEFA adopted a system of rules applicable to transfers between associations within its jurisdiction, entitled “Principles of Co-operation between Member Associations of UEFA and their clubs”. Thus, players were granted the right to enter into a new contract as soon as the contract with the former club had expired²⁷. Although the old club was still entitled to a transfer fee, the regulations stipulated that the national association the player was leaving, was obliged to issue an international clearance certificate as soon as it was notified of the transfer by the former club²⁸. In case of a disagreement between the clubs regarding the amount of the transfer fee, the matter was referred to a panel of experts set up by UEFA, which would make a binding decision based on the player’s age and gross income²⁹. However, the transfer fee calculated by the board of experts could not exceed the maximum sum of CHF 5,000,000³⁰. In addition to these provisions, the rules put a special emphasis on the fact that the business relationship between the two clubs in respect of the transfer fee “shall exert no influence on the sporting and professional activity of the player” and repeated that “the player shall be free to play for the club with which he has signed the new contract”³¹. Additionally, the national associations were urged to adapt their national transfer rules to the UEFA system as soon as possible.

²⁵ Article 16(2).

²⁶ At paragraph 3 of the Preamble of the 1994 FIFA transfer regulations.

²⁷ Article 12 of the 1990 UEFA transfer regulations.

²⁸ Article 13.

²⁹ Article 14.

³⁰ Article 3 of the enclosure to the 1990 UEFA transfer regulations.

³¹ Article 16 of the 1990 UEFA transfer regulations.

2.3.3.2. The 1992 UEFA Transfer Regulations

After the events which gave rise to the Court's decision in the *Bosman* case, UEFA opened negotiations with the Commission in respect of its transfer system. As a result, a clause was included in every player's contract, allowing him to sign for a new club as soon as the contractual responsibilities with his former club had expired and permitting him to play for that club immediately³². Provisions to that effect had already been included in the 1990 regime and were reaffirmed in the "Principles of Co-operation between Member Associations of UEFA and their Clubs" that came into force on 1 July 1992. However, changes were made to the transfer fee calculation scheme of the UEFA board of experts, in particular the provision establishing a maximum amount was abolished.

2.3.3.3. The 1993 UEFA Transfer Regulations

The 1993 "Rules on the determination of compensation for transfers" were based on Article 16(2) of the 1991 FIFA transfer regulations, which provided the confederations with the authority to adopt rules concerning the settlement of disputes between two clubs with regard to transfer fees. Hence, the 1993 regulations were largely preoccupied with the lay-out of a detailed system for the calculation of transfer fees, establishing a calculation scheme similar to the provisions in the previous transfer regulations: in case of a dispute between clubs the matter was referred to a committee which would then calculate the transfer fee according to the player's age and income³³. Apart from that, the UEFA regulations introduced a rule according to which all international transfers, including those between associations belonging to UEFA, were to be governed by the FIFA transfer rules. Additionally, it was confirmed that after the expiry of the contract with his old club, a player was free to sign with another club for which he was able to play with immediate effect³⁴.

When analysing the changes made to the football transfer system, it becomes evident that in the light of the *Bosman* case the football authorities tried to adjust their regulations in order to avoid a conflict with European law. The FIFA and UEFA transfer rules in force at the time when the proceedings at the European Court of

³² See *Bosman*, at para 17.

³³ Article 1 of the 1993 UEFA transfer regulations.

³⁴ Article 2.

Justice began both stated that a dispute about the amount of a transfer fee could not prevent a player to move to another club. By separating the transfer fee from the transfer itself, the footballing bodies tried to establish that the transfer of a player happened independently from the requirement to pay a fee and the player's sporting activity was not affected by the transfer regulations. Thus, it was claimed that the transfer system did not create an obstacle to free movement, as a player was not only free to sign for another club upon the expiry of his previous contract, but could also immediately play for the new club, even if an agreement regarding the amount of the transfer fee had not been reached. However, despite the progress made from the 1986 FIFA regulations, where an agreement over the amount of the transfer fee was necessary for a player to be able to play for another club, the transfer rules in force at the time of the *Bosman* judgment could not change the fact that the new club inevitably had to pay a transfer fee. As pointed out by Advocate-General Lenz, "no club which plans reasonably and cautiously is likely to be prepared to engage a player before the amount of the transfer fee is settled or it has at least made sure of the maximum amount it might have to pay"³⁵. Consequently, the football transfer regulation were held to build an obstacle to the free movement of professional football players, since a player effectively could not move to another club without his new club having to pay a transfer fee, unless he had been released on a free transfer by his former club.

2.4. THE FIFA TRANSFER REGULATIONS 1997³⁶

Although the transfer system has been modified several times over the years, the most significant changes before the 2001 regime were made as a result of *Bosman*. As commonly known, after the Court's decision, the international football associations were forced to change their transfer system in such a way that EEA-nationals who had reached the end of their contracts were allowed to move freely between clubs in different EEA Member States. The new "Regulations governing the Status and Transfer of Football Players" came into force on the 1st of October 1997 and considering all the excitement, it may surprise some that, compared to the FIFA

³⁵ AG Lenz in *Bosman*, at para 150.

³⁶ Hereinafter referred to as "the 1997 Regulations".

regulations in 1994, effectively only one paragraph had been altered. After the findings of the Court had been accommodated in the 1997 FIFA Regulations, the panic over the *Bosman* judgment slowly died down and most football officials and fans thought that this was the end of Community interference in the “beautiful game”. Since out-of-contract transfers had only accounted for about ten percent of transfer revenue and domestic transfers were unaffected by *Bosman*, the impact of the changes to the transfer rules did not seem as drastic as many had feared. Moreover, clubs could still receive substantial transfer fees for the sale of players under contract, which resulted in clubs concluding long-term contracts with players. However, only a few years after *Bosman*, new difficulties arose for the football authorities, as Community officials had become aware of the sometimes exorbitant fees that clubs charged for mid-contract transfers and started to question what was left of the transfer system. As commonly known, this led to the 2001 “compromise” between FIFA and Commission, which will be analysed further below.

Before examining whether the Commission’s objections against the 1997 FIFA Regulations were in fact merited, though, it shall be outlined how the transfer of a player from one club to another is actually conducted and how the legal nature of a transfer may be described.

2.5. THE TRANSFER PROCEDURE

Until the *Bosman* case, the legal nature of a player’s transfer had always been defined as a contract between two clubs, linked by the requirement of a transfer fee. Whereas most writers classified the transfer of a player from one club to another as a sale³⁷, whereby the new club pays the transfer fee in order to receive the transfer certificate for the player, others considered the transfer fee a compensation for training and/or development of a player³⁸. However, after the Court’s decision in *Bosman*, the system has changed in such a way that there are more and more transfers where there is no contact between the new and the old club. Thus, the legal

³⁷ See Westerkamp, G., *Ablöseentschädigungen im bezahlten Sport* (Dissertation, Münster, 1980), p. 75; Becker, U., *Verfassungsrechtliche Schranken für die Regelung des Berufsfußballsports in der Bundesrepublik Deutschland* (Dissertation, Mainz, 1982), p. 123.

³⁸ See Westerkamp, G., *op. cit. supra* note 37, p. 76.

nature of a transfer cannot be based on the relationship between the two clubs. Presumably, the definition used by the Court in *Bosman*, describing a transfer as a factual, rather than a legal process, is the most adequate: “A transfer is defined as the transaction by which a player affiliated to an association obtains a change of club affiliation”³⁹.

After the changes made to the transfer system as a result of *Bosman*, international transfers were governed by the FIFA Regulations for the Status and Transfer of Players 1997 and the so-called Circulaire No 616. Regarding the European associations, UEFA passed on the opportunity to establish its own transfer regulations, merely drawing up a calculation scheme to determine transfer fees in case of a dispute between clubs. Thus, the FIFA regulations also applied to transfers between European clubs. Additionally, an international transfer had to comply with the provisions of the relevant national associations. Under the 1997 FIFA Regulations, national associations were obliged to establish a system for transfers effected within their jurisdiction corresponding to the FIFA rules set out in § 2 of the preamble. It is significant that Articles 14 to 20 of the 1997 Regulations, which determined the procedure for international transfers of players were not binding on a national level and the national associations were allowed to put a different procedure in place for domestic transfers⁴⁰.

When a player moved from a club affiliated to one national association to a club belonging to a different association, the transfer had to follow the procedure set out by the 1997 Regulations. Although the transfer rules have undergone a major change since, the rules concerning the technicalities of an international transfer essentially still apply today. First of all, a player must be registered with a national association to play for a club as either amateur or professional, depending on whether he has ever received any remuneration other than for actual expenses incurred during the course of his participation in or for any activity connected with football⁴¹. In this

³⁹ *Bosman*, at para 6.

⁴⁰ In contrast, Article 1(3)(a) of the 2005 Regulations establishes that its Articles 2-8, 10, 11 and 18 (status of players, reacquisition of amateur status, termination of activity, registration, registration periods, player passport, application for registration, loan of professionals, unregistered players and special provisions relating to contracts between professionals and clubs) have to be included, without modification, in the associations' national transfer rules.

⁴¹ Articles 1 – 4 of the 1997 Regulations; see also Article 5 of the 2005 Regulations.

context, it has already been stated that the classification of an athlete as either amateur or professional by sports bodies cannot determine whether he is engaged in an economic activity in the sense of Article 2 of the Treaty. However, comparing the definition of amateur in Article 2(1) of the 1997 Regulations and the Court's understanding of an economic activity in *Deliège*, it seems that a non-amateur as defined by FIFA will always be protected by the Treaty, whereas an amateur footballer will normally not be deemed to practise sport as an economic activity. In both cases, the dividing line is whether a person receives remuneration for playing football, not including expenses such as travelling costs⁴². Hence, when analysing the transfer system in the light of Community law, generally only the provisions regarding professional footballers will be relevant.

Any player, whether amateur or professional, has to be registered with a national association in order to be eligible to play for a club⁴³. Once a player is registered with a club affiliated to a national association, he may not be registered with a club from another national association, unless the latter has received an international transfer certificate issued by the national association the player wishes to leave⁴⁴. However, only the national association that the player wishes to join is entitled to request the international transfer certificate, not the player himself⁴⁵. As soon as the international transfer certificate has been received, the player is free to play for the club⁴⁶.

2.5.1. Transfer of Players Out of Contract

Comparing the 1997 Regulations to the rules pre-*Bosman*, it becomes evident that, bar the adaptation of Article 14(8) of the 1994 FIFA transfer regulations, the system remained unchanged. The effects of the amendment of Article 14, however, were

⁴² However, it should be noted that Article 2(1) of the 2005 Regulations provides that besides the requirement of being paid more than the expenses effectively incurred, a player is only deemed a professional if he has a written contract. Although this criterion will usually be met in the case of players regarded as workers pursuant to EC law, it cannot be ruled out that discrepancies occur due to a player not having a written contract despite the fact that he is actually paid in excess of his expenses.

⁴³ Article 6 of the 1997 Regulations; see also Article 5 of the 2005 Regulations.

⁴⁴ Article 7(1) of the 1997 Regulations; see also Article 1(1) of Annex 3 to the 2005 Regulations.

⁴⁵ Article 8(1) of the 1997 Regulations; similar Article 2(2) of Annex 3 to the 2005 Regulations.

⁴⁶ Article 20(1) of the 1997 Regulations.

immense: whereas before, it had contained the requirement of a payment of compensation for training and/or development on every transfer, the 1997 Regulations entitled any EEA-citizen transferring from one Member State to another to free movement on the expiry of his contract. The amended paragraph eight of Article 14 stated that:

“This article does not apply to the transfer of a player *who is a proven national of a country that is a member of the European Union (EU) or the European Economic Area (EEA)*^[47] if the transfer involves two national associations in member countries of the EU or the EEA and if the player’s employment contract with his former club has validly expired from the point of view of both parties (that is, if the fixed period of contract has terminated or if both parties have mutually agreed either to curtail or rescind the contract with immediate effect)”.

After years of so-called “football slavery”, the new Article 14(8) of the 1997 FIFA transfer regulations finally gave EEA-footballers the right to move freely at the end of their contracts. Having said that, it has to be emphasised that the exception did not apply to those cases where a contract between a player and a club had been terminated unilaterally, as Article 14(8) exclusively referred to the scenario whereby a contract had been terminated by either lapse of time or mutual agreement.

Since Article 2(3) of the FIFA Statutes does not allow any discrimination on grounds of nationality, it was necessary to adjust Article 14(8) of the 1997 FIFA transfer regulations in such a way that the exemption would also apply to non-EEA players. Hence, in Circular No 616 from 4 June 1997, FIFA announced that, according to a decision of the FIFA Executive Committee, players who did not come from a Member State of the EEA, but were transferred within this area, were to be given equal treatment with EEA nationals as from 1 April 1999. In order to comply with this decision, an additional paragraph was introduced into Article 14(8) of the 1997 FIFA transfer regulation, stating that the exception for EEA nationals would only apply to transfers concluded before 1 April 1999. Hence, after the set date effectively all out-of-contract players moving within the EEA were entitled to a free transfer. However, it is important to note that the requirement of a transfer fee still

⁴⁷ The text in italics does not apply to transfer contracts concluded after 1 April 1999, see the explanations regarding FIFA Circular No 616 below.

applied to transfers of players between national associations of which at least one was not an EEA Member State.

2.5.2. Transfer of Players Still in Contract

Whereas the current transfer system provides for the case of a breach of contract by a player, the 1997 Regulations did not allow a unilateral termination of contract. Thus, according to Article 12, a non-amateur was only free to conclude a contract with another club if:

- (a) the contract with his present club had expired or was about to expire within six months; or
- (b) the contract with his present club had been rescinded by one party or the other for valid reasons; or
- (c) the contract with his present club had been rescinded by both parties by mutual agreement.

In Circular No 616, FIFA clarified that the unilateral termination of a contract by a player was considered a breach of Article 12(1) of the FIFA regulations, with the effect that the national association was entitled to refuse an international transfer certificate. Moreover, paragraph 2 of Article 12 stated that a player's new contract could not include any clause which would interfere with the proper completion of his existing contract and that a player who wished to enter a new contract within six month prior to the expiry of his existing contract, was permitted to sign only one new contract during that period. The most significant passage of Article 12, though, can be found in paragraph 4, which prescribed that:

“A player may not be transferred during the period of validity of his contract unless the three parties involved – the club he is leaving, the player himself, the club he is joining – all concur.”

This provision had the effect that a player who wanted to move to another club, but was still bound by the contract with his present club, could not escape this contractual agreement, unless the current club consented to a termination. This was also reflected in Article 7(2), providing that a national association could refuse an international transfer certificate if a player had not fulfilled the terms of his contract

with the club he wanted to leave. Hence, a transfer, even under payment of damages for breach of contract according to the applicable national law, was not possible under the 1997 Regulations. Further protection for clubs from illicit poaching of players by other clubs was provided by Article 13, which, subject to a fine of at least CHF 50,000, prohibited a club from commencing negotiations with a player still under contract, unless he had informed the other club first.

3. FREE MOVEMENT OF PERSONS – ARTICLE 39

It has already been established that sport is subject to Community law when practised as an economic activity in the sense of Article 2 of the Treaty. Considering the substantial amounts of money involved in the transfers of professional footballers around Europe, it is evident that sporting rules such as regulations restricting transfer activity will, in principle, be caught by the provisions on the free movement of persons. However, whereas Article 39 of the Treaty was initially intended as an instrument against measures adopted by the Member States, in the case of the sports sector, it is usually examined in connection with provisions drawn up by private parties.

3.1. APPLICATION TO PRIVATE PARTIES

Usually, regulations adopted by private organisations are of a civil law nature and only have an effect between private parties. Consequently, there have been doubts as to whether the provisions on free movement may be applied to rules established by non-governmental bodies. The question of a direct horizontal effect of Articles 39 and 49 has been brought before the Court primarily in connection with cases concerning the rules of sporting associations. In this context, the Court has confirmed that the provisions on the free movement of persons and services also apply to “rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services”¹. According to the Court, the removal of obstacles to free movement would be compromised if the abolition of state barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law². Another reason for the application of Articles 39 and 49 to rules of private parties is the concept of the “effect utile”, which shall ensure the effective and uniform application of

¹ Case 36/74 *Walrave and Koch v. Union Cycliste Internationale* [1974] ECR 1405, at para 17; see also *Bosman*, at para 82; Case C-51/96 & C-91/97 *Christelle Delière v. Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549, at para 47; Case C-176/96 *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération Royale Belge des Sociétés de Basketball ASBL (FRBSB)* [2000] ECR I-2681, at para 35.

² See *Walrave*, at para 18; *Bosman*, at para 83; *Delière*, at para 47; *Lehtonen*, at para 35.

Community law in the Member States. As in some countries working conditions are governed by national law, whereas in others they are determined by agreements and other acts concluded or adopted by private persons, such as collective bargaining agreements, the restriction of the scope of the freedom of persons and services to acts of public authority would create the risk of inequality in their application³.

The example of the football transfer rules, which regulate the employment of professional footballers, shows that the direct application of the rules on free movement is necessary to protect the individual in relation to regulations established by private parties. From the perspective of a football player who tries to access the employment market, it makes little difference whether provisions hindering him from playing are adopted by a private or a public authority. A person wanting to play football professionally has no choice but to accept the regulations drawn up by the football associations; thus, owing to this diminished power of negotiation, footballers deserve direct protection by Community law, without having to rely on legislation by the relevant Member State. However, whereas the Court has applied Article 39 to rules of private parties that are aimed at regulating employment relationships in a “collective manner”, there are debates as to whether the provisions on the free movement of workers should also be applicable to actions of individual employers⁴.

It should be mentioned that the direct application of Articles 39 and 49 to acts of private parties regulating employment collectively has not been undisputed; some writers argue that the Court should have decided against a horizontal direct effect⁵, as it did in the case of Article 28 of the Treaty⁶. According to these academics, the obligation of the Member States under Article 10 to ensure that there are no obstacles to the free movement of goods⁷ (including measures adopted by private parties),

³ See *Walrave*, at para 19; *Bosman*, at para 84.

⁴ See Craig, P. & De Burca, C., *EU Law* (3rd edn., Oxford University Press, Oxford, 2003), p. 703; however, the Court has confirmed that Article 39 applies to a rule by a private employer requiring a specific language qualification from all job applicants, see Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139, at para 36.

⁵ See Streinz, R. & Leible, S., “Die unmittelbare Drittwirkung der Grundfreiheiten”, (2000) 15 *EuZW*, p. 464.

⁶ See Case 311/85 *Vereniging van Vlaamse Reisebureaus v. Social Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, at para 30.

⁷ This obligation originated in a case involving protests by French farmers, trying to block agricultural imports from other Member States, Case C-265/95 *Commission v. France* [1997] ECR I-6959, at para 32 and was confirmed by Case C-112/00 *Schmidberger v. Republic of Austria* [2003] ECR I-05659.

equally applies to Articles 39 and 49. Thus, the interests of individuals suffering under restrictions set up by private parties would be protected by national law and a Member State which has failed to fulfil its obligations under the Treaty would be liable for damages.

3.2. APPLICATION TO SPORTING RULES

The Court's case law establishes beyond doubt that measures introduced by sporting associations are in principle subject to the application of Article 39 of the Treaty. Still, there are claims that the provisions on free movement offer room for a sporting exemption in EC law. Thus, the nature of sporting rules shall be examined, analysing in which cases the provisions on free movement may not be applicable.

3.2.1. The Rules of the Game

The first category of sporting regulations that are argued to fall outside the scope of Article 39 refers to what are commonly known as the “rules of the game”, measures that regulate the manner in which sport is played and are of sporting interest only. Rules of the game are not covered by Community law as they are of an exclusively sporting nature and do not have an economic dimension. As pointed out by Advocate-General Lenz in *Bosman*, for example, it is indeed irrelevant for the right to free movement whether a football match lasts 90 or 80 minutes or whether two or three points are awarded for a win⁸.

Commission officials have emphasised that rules of the game are not subject to the application of EC law, in so far as they are applied in an objective, transparent, and non-discriminatory manner⁹. However, this implies that if such sporting rules are applied in a non-objective and discriminatory manner, the Treaty may be applicable. Taking into account that the provisions on free movement exclusively refer to

⁸ AG Lenz in *Bosman*, at para 215.

⁹ See “Report from the Commission to the European Council with a view to safeguarding current sports structures and maintaining the social function of sport within the Community framework” (“The Helsinki Report on sport”), Brussels, 10.12.1999, COM (1999) 644 final, point 4.2.1.1; Speech Pons, J.-F., “Sport and European Competition Policy”, Fordham Corporate Law Institute, New York City, 14.10.1999, p. 7; Speech van Miert, K., “Sport et concurrence: Développements récents et action de la Commission”, Forum Européen du Sport, Luxembourg, 27.11.97, available at http://www.europa.eu.int/comm/competition/speeches/text/sp1997_069_fr.html.

situations with an economic dimension, the Commission presumably has those cases in mind, where the application of mainly sports related rules has an effect on economic activity. For example, the provisions establishing in which cases red cards should be awarded constitute rules of the game and are not caught by the Treaty. On the other hand, the rule providing for the sanction following the award of a red card has an economic dimension inasmuch as it restricts a player's economic activity. Strictly speaking, in view of its economic effect, such a rule comes under the scope of the Treaty and therefore may not be regarded as a “rule of the game”; however, as pointed out by the Commission, in so far as it is applied in an objective, transparent, and non-discriminatory manner, it will generally not infringe the prohibition set out in Article 39. The somewhat imprecise diction of the Commission shows that there is a danger of confusing purely sports related rules with provisions which might have a purely sporting objective, but have an economic impact. As will be demonstrated below, it is important that sporting rules are assessed according to their effect rather than their object¹⁰.

3.2.2. National Teams – Precedent for a Sporting Exemption?

The application of the Treaty freedoms to sporting matters becomes more complicated where measures are adopted for sporting reasons, but have an impact on economic activity. In this context, the Court's case law in *Walrave* and *Donà* regarding nationality restrictions in respect of selection rules for sport teams, has been interpreted in such a way that measures of a predominantly sporting nature are not covered by Article 39 of the Treaty, provided they have a merely incidental economic effect.

In its decision in *Walrave*, the Court stated that there was a restriction on the scope of the provisions on free movement as regards “the composition of sport teams, in particular national teams, the formation of which is a question of purely sporting interest and as such has nothing to do with economic activity”¹¹. In *Donà*, the Court limited this proposition and held that foreign players could be excluded from “participation in certain matches for reasons which are not of an economic

¹⁰ See point 3.2.3.4 below.

¹¹ *Walrave*, at paras 8 - 9.

nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries”¹². In contrast to the *Walrave* judgment, the Court seemed to have realised that the composition of sports teams may well be influenced by economic motives and implied that in such a case the Treaty would apply. Taking into account the wording of the two decisions, referring to a “restriction on the scope”, it is evident that the Court did not intend to justify the selection regulations under some sort of “rule of reason”, but considered the provisions on free movement not to be applicable¹³.

Although it seems obvious that only Italians should be allowed to play for the Italian national team and Germans should be excluded from the Portuguese Selecção, the legal base for an exemption from the scope of EC law is not as easy to find as one would expect. Taking into account the immense economic significance of sports events where national teams compete against each other, such as the Olympic Games or the FIFA World Cup, it is difficult to argue that participation in such competitions does not constitute an economic activity, especially as the athletes will usually receive remuneration for taking part or are awarded winning bonuses¹⁴. Thus, is it possible to deduct from *Donà* that sporting rules may fall outside the scope of Article 39 even though they have an economic impact, provided they are purely motivated by sporting considerations? Analysing the wording of the decision, which limits the restriction of scope to selection rules regarding “certain matches” whereby foreigners are excluded for reasons relating to the “particular nature and context” of these games, it may be assumed that the Court did not intend to establish a general exemption for sporting practices purely motivated by non-economic reasons, but construed a rather narrow exemption, applicable to team selection rules only.

¹² *Donà*, at para 14.

¹³ See also AG Lenz in *Bosman*, para 139; the Court in *Bosman* has been accused of having used inexact terminology in this respect, as it considered the *Donà* case law when examining whether the nationality restrictions at issue could be justified, see Weatherill, S., “European Football Law” in *Collected Courses of the 7th Session of the Academy of European Law* (Kluwer, The Hague, Netherlands, 1999), p. 354; however, it may be argued that the Court merely intended to emphasise that *Donà* did not apply to the *Bosman* selection rules, as they did not concern national teams. This view is supported by the fact that the Court had already cited *Donà* at an earlier stage whilst considering a possible exemption for sporting rules from the Treaty.

¹⁴ See also AG Lenz in *Bosman*, at para 139.

In contrast, Advocate-General Cosmas in his opinion in *Deliège* concluded from the case law in *Walrave*, *Donà* and *Bosman* that certain sporting rules or practices do not fall within the scope of the Treaty, as long as they are justified by specific, non-economic reasons which relate purely to sport¹⁵. The Court in *Bosman*, when examining the possibility of an exemption, interpreted *Donà* in such a way that it meant to exclude *any* sporting rules or practises justified on non-economic grounds which relate to the particular nature and context of certain matches from the scope of the provisions on free movement¹⁶. However, the fact that *Bosman* did not expressly refer to rules or practices *excluding foreign players from participation in certain matches* cannot change the fact that the exemption is limited to measures concerning the special circumstances of certain matches, which will generally only include selection rules. Moreover, analysing the relevant case law after *Bosman*, it is noticeable that both the judgments in *Deliège* and *Lehtonen* referred to the wording of the *Donà* case, rather than stating an exemption including other sporting rules¹⁷.

The Court has made it very clear that sport falls under the Treaty when practised as an economic activity, which means that only rules without an economic dimension, such as the previously mentioned “rules of the game” will escape the application of Community law. However, if there was an exemption for rules purely motivated by sporting reasons, the scope of such a restriction of the Treaty would be difficult to define. First of all, may any sporting rule be justified by non-economic reasons relating purely to sport, no matter how much it impedes free movement? Considering that rules which do not affect economic activity are not covered by EC law in any case, such an exemption would only be relevant if it included provisions by sporting associations having an impact on economic activities. Applying the approach suggested by Advocate-General Cosmas would have as a consequence that any rule motivated by reasons purely relating to sport may fall outside the scope of the Treaty, no matter how big an obstacle to free movement it might be. Besides, when a rule is capable of having an effect on economic relations, it will be very

¹⁵ AG Cosmas in *Deliège*, at para 69; similarly AG Trabucchi in *Donà*, p. 1345, who argued that even if sport is practiced as an economic activity, nationality restrictions could fall outside the scope of the Treaty, provided they are based on purely sporting considerations and proportionate to the end pursued.

¹⁶ *Bosman*, at para 76.

¹⁷ *Deliège*, at para 43; *Lehtonen*, at para 34.

difficult to establish whether it exclusively relates to sporting reasons, or whether economic considerations might have been involved. Thus, it can be concluded that such a restriction of the Treaty not only lacks support from previous case law, but would also be difficult to apply. Moreover, as will be demonstrated in connection with the justificatory test introduced by *Bosman*, a rejection of a sporting exemption does not mean that sporting considerations may not be recognised under the provisions on free movement, only that they are taken into account at a later stage.

Returning to the issue of national teams, the question why the open discrimination against foreign players should not be covered by the Treaty, despite the economic significance of international tournaments, remains unanswered. In this context it could be argued that the fact that international competitions are not completely unrelated to economic activities cannot divert from their purely representative nature as an assortment of the best players from one country. This would mean that regardless of the enormous financial significance of international competitions, the crucial part is still the character as a tournament between representative teams from different countries. However, in line with the view proposed above, the objective behind a certain sporting rule may not prevent the application of the Treaty as such, even if it is purely motivated by sporting reasons. Thus, it is more appropriate to accept selection rules for national teams by reason of their sporting necessity, since the removal of such rules would automatically mean the end of international team sport in Europe¹⁸. If foreigners were allowed to play in national teams, their representative character would be lost, which would rob those teams of their “raison d’être”. The rationale behind the Treaty freedoms is to allow all EU citizens the same access to certain institutions, not to destroy those institutions altogether.

On the other hand, the most simple and probably most logical approach to assessing selection rules for national teams is the “officious bystander” test, introduced by Advocate-General Warner in *Walrave*¹⁹: if it is supposed that an officious bystander had asked the founders of the Treaty whether they intended that the articles on free movement should preclude a requirement that, in a particular

¹⁸ Regarding rules necessary for the functioning of sporting competition, also see point 3.2.3.2 below.

¹⁹ AG Warner in *Walrave*.

sport, a national team should consist only of nationals of the country it represented, it is more than likely that the answer would have been in the negative. Although this test has been criticised because it presumes the will of the founders of the Treaty without having definite proof²⁰, it impresses through its simplicity and one cannot help but agree with Advocate-General Warner that the legality of national teams is simply dictated by “common sense”²¹.

As a matter of interest it should be added that the Court in *Walrave*, as well as *Donà* has only mentioned national teams as an example of nationality restrictions in sport to which the Treaty does not apply. Although the exemption is construed extremely narrowly, one may wonder whether there are other possible scenarios, whereby foreign athletes may be prevented from participating in certain matches for non-economic reasons, which relate to the particular nature of such matches and are of purely sporting interest. Although it is highly unlikely that the football associations are going to introduce such restrictions in club football, it could be argued that a rule, according to which players of a certain club have to be born or raised in the club’s region, would not be caught by the provisions on free movement, as long as it applies to nationals and EU-foreigners alike. The introduction of such a rule would bring club football back to a position where the different clubs actually represent a certain region within Europe, which would make it easier for fans to identify with “their” club²² – reasons which are not motivated by economic considerations, relate to the particular nature of football games as matches between two teams representing a certain town or region and are of sporting interest only.

²⁰ See for example Plath, K., “*Individualrechtsbeschränkungen im Berufsfußball*” (Duncker & Humblot, Berlin, 1999), p. 78.

²¹ See AG Warner in *Walrave*.

²² At a time where Chelsea has made history by becoming the first English club to start a game with a formation not including a single British player (26.12.1999, away against Southampton) and Arsenal has even played a game without any British players on the pitch or on the bench (14.2.2005, home against Crystal Palace), many football fans wish back the “good old times” of teams like the legendary 1967 European Cup winning “Lisbon Lions” of Celtic, who were all born within a 30 mile radius of Parkhead.

3.2.3. Non-discriminatory Rules – the Market Access

Approach

In *Bosman*, the Court acknowledged for the first time that Article 48 (now 39) of the Treaty prohibits rules constituting an obstacle to the free movement of workers, even if they do not discriminate on the basis of nationality²³. Thus, the Court extended its case law regarding the interpretation of the provisions on the free movement of goods²⁴ and services²⁵ to Article 39, stating that “provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned”²⁶.

However, there have been claims that the transfer system in *Bosman* should have been treated in analogous fashion to the measures at issue in *Keck and Mithouard*²⁷ and hence, did not infringe the principle of free movement of workers²⁸. As commonly known, the decision in *Keck* constituted a reaction to the abuse by commercial traders of Article 30 (now 28) as a legal instrument to contest indistinctly applicable measures by Member States. Revising its earlier case law, the Court held that non-discriminatory measures concerning selling arrangements did not come under the scope of Article 30 (now 28), “so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those

²³ See *Bosman*, at para 95.

²⁴ See Case C-120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon) [1979] ECR 649.

²⁵ See Case C-275/92 *HM Customs & Excise v. Schindler* [1994] ECR I-1039, at para 43.

²⁶ *Bosman*, at para 96.

²⁷ Cases C-267-268/91 *Keck and Mithouard (Criminal Proceedings against)* [1993] ECR I-6097.

²⁸ For example the arguments by UEFA and URBSFA brought forward in the proceedings to the *Bosman* case, see *Bosman*, at para 102; another argument against the application of Article 39 to the transfer rules at issue in *Bosman* has been raised by Daniele, L., “Non-Discriminatory Restrictions to the Free Movement of Persons”, (1997) 22(3) ELRev, pp 191 – 200, who takes the view that Article 39 should be interpreted by analogy with case law regarding Article 29, meaning that indistinctly applicable measures relating to the “export” of persons or services do not fall within the scope of the Treaty. The issue was addressed by AG Lenz in *Bosman*, at para 207, who dismissed a restrictive interpretation of Article 48 (now 39) by reason of the case law concerning Article 34 (now 29), stating that “rather the case law on Article 34 would have to be reconsidered instead” and referred to AG Jacobs’ analogous conclusion in Case C-384/93 *Alpine Investments BV v. Minister van Financien* [1995] ECR I-1141, at para 52 on the applicability of Article 59 (now 49).

from the Member States”²⁹. Supporters of the transfer rules at issue in *Bosman* argued that the transfer regulations affected all football transfers in the same way, regardless of a player’s nationality and the national associations between which he was transferred. As the transfer system was generally applicable, non-discriminatory and did not create an advantage for the national market, it was claimed to create a situation comparable to the selling arrangements in *Keck*³⁰. The Court, by analogy with earlier case law concerning the free movement of services³¹, rejected this view with the argument that the transfer regulations in *Bosman* had to be distinguished from the rules on selling arrangements that applied exclusively within the territory of a Member State, as they directly affected players’ access to the employment market³². Leaving aside the question whether *Keck* may be relevant in connection with non-discriminatory measures not affecting access to employment in other Member States³³, it has to be welcomed that the Court rejected the *Keck* analogy in the case of the *Bosman* transfer rules and adopted the market access approach, which protects trans-frontier free movement of workers as such, instead of merely granting the right to equal treatment.

Having emphasised that the transfer rules at issue came under the scope of the provisions on the freedom of workers, the Court in *Bosman* went on to apply *Kraus*³⁴ and *Gebhard*³⁵, introducing a test comparable to the “rule of reason” approach in *Cassis de Dijon*. Thus, it was established that even measures restricting the access to the market in another Member State did not necessarily breach Article 39, provided they pursued a legitimate aim compatible with the Treaty, were justified by pressing reasons of public interest and fulfilled the requirement of proportionality³⁶. In respect of the transfer rules at issue, the Court recognised that “in view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of

²⁹ *Bosman*, at para 16.

³⁰ See for example Scholz, R. & Aulehner, J., “Die ‘3+2’-Regel und die Transferbestimmungen des Fußballsports im Lichte des europäischen Gemeinschaftsrechts”, (1996) 2 Spurt, p. 47.

³¹ Case C-384/93 *Alpine Investments BV v. Minister van Financien* [1995] ECR I-1141.

³² *Bosman*, at para 103; see also the opinion of AG Lenz in *Bosman*, at paras 205-207.

³³ In this context, see point 3.4.2 below.

³⁴ Case C-19/92 *Kraus v. Land Baden-Württemberg* [1993] ECR I-1663.

³⁵ Case C-55/94 *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

³⁶ *Bosman*, at para 104.

equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate”³⁷. Although the transfer system was ultimately held to fall foul Article 39(1) of the Treaty, *Bosman* constituted an important decision for sport, as the social significance of sporting activities was acknowledged by the Court for the first time. Thus, the Court accepted certain sporting interests as legitimate aims, which opened up the possibility to justify a measure restricting free movement for sporting reasons.

3.2.3.1. The Market Access Criterion in Case Law - *Deliège*

After *Bosman*, the *Deliège* case proved to be the first opportunity to test the market access approach in relation to indistinctly applicable sporting measures. In contrast to the *Bosman* transfer regulations, the selection rules adopted by the Belgian Judo Federation were considered not to determine the conditions governing access to the labour market by professional sportsmen³⁸. The decision has been rightly criticised in the sense that the rules at issue did in fact restrict the access of athletes to the employment market in another Member State, since those who had not been selected to participate in a particular tournament were clearly hindered from pursuing their profession³⁹, an opinion that was shared by the Advocate-General⁴⁰.

Apart from the fact that *Deliège* raised questions as to when an indistinctly applicable measure hinders access to the employment market, it is surprising that the Court did not confirm that the applicable rules were not caught by the restriction in Article 49, after having established that access was not affected. Instead, it went on to state that a limitation of the number of participants in a tournament was inherent in the conduct of an international sports event and pointed out that it was up to the sports federations to establish appropriate selection rules⁴¹. Thus, the Court left it open whether these considerations should have merely supported the fact that free movement was not restricted by the rules at issue, or whether Article 49 of the Treaty applied in principle, but the selection rules were justified.

³⁷ *Bosman*, at para 106.

³⁸ *Deliège*, at para 61.

³⁹ See van den Bogaert, S., “The Court of Justice on the Tatami: Ippon, Waza-Ari or Koka”, (2000) ELRev, p. 561.

⁴⁰ See AG Cosmas in *Deliège*, at para 66.

⁴¹ *Deliège*, at paras 64 - 67.

Taking into account the market access test, one would have assumed that a non-discriminatory rule, deemed not to affect the access to the employment market in another Member State, would be outwith the scope of the provisions on free movement, which would have rendered any further arguments unnecessary. However, had the Court been of the opinion that the measures were capable of impeding free movement, the next logical step would have been to examine the selection rules under the *Bosman* justificatory test. In the absence of such considerations, it has to be assumed that the Court did not mean to move away from the market access approach, but simply intended to emphasise that even if access had been restricted, the selection rules would have been accepted under Article 49(1) by reason of their sporting necessity.

3.2.3.2. A “Rule of Reason” for Measures Necessary for Sporting Competition?

Apart from the rather confusing application of the market access test, the decision in *Deliège* is significant as it implies that measures necessary for the organisation of a sport do not fall foul of Article 39(1). Considering that Articles 39 and 49 shall protect the worker or provider of services and not limit their economic activities, it certainly makes sense to accept sporting rules without which sporting competition could not exist in the first place, even if the measures constitute an obstacle to free movement. However, a “rule of reason” for such essential sporting rules has to be construed narrowly. Accordingly, it must not be interpreted to include other rules or practices, simply based on the fact that they serve a sporting interest. Thus, in principle only those sporting rules that are a *conditio sine qua non* for the existence of a sport or the organisation of sporting competition may be accepted.

In connection with the selection rules at issue in the *Deliège* case, this means that they should only have been justified under Article 49(1) by reason of their sporting necessity if judo competitions would not have been possible without them. It is evident that for organisational reasons, certain selection rules are required in order to stage an international judo tournament. Having said that, it is almost impossible to draw the line between selection rules considered indispensable for the functioning of sporting competition and those which go beyond what is necessary. In other words, how is it to be determined if selection rules are too restrictive, taking into account

that it could always be argued that the organisation of a tournament would still be possible if one or two athletes more were allowed to participate. Also, it has been submitted in the context of the *Deliège* selection rules that there would have been less restrictive methods available in order to keep the number of participants down, the main point of criticism being that there was a limitation on the number of athletes from one country and the selection was made by the national federation⁴². A system whereby athletes are chosen purely according to their sporting performance would certainly be a more objective method to restrict the number of participants in a tournament, particularly as the national federation was not bound to nominate the best judoka.

However, the Court, having established that selection rules were necessary in principle, did not assess the proportionality of the provisions at issue, but merely observed that “it naturally falls to the bodies concerned [...] to lay down appropriate rules and to make their selections in accordance with them”, arguing that the delegation of such a task to the national federations was appropriate as they had the necessary knowledge and experience⁴³. Although the Court did not explicitly refer to freedom of association, it still acknowledged the sports bodies’ right to self-regulation, deciding it was best left to them to choose appropriate selection rules.

It definitely has to be welcomed that the Court respected the sports associations’ legal autonomy, paying attention to freedom of association, even though it was not expressly mentioned in the judgment. However, the decision in *Deliège* has raised more questions in this respect than it answered. Firstly, the Court should have expanded on the sporting necessity argument, establishing when a rule is deemed to be inherent in the conduct of a particular sport or sporting competition. Moreover, one may wonder whether the fact that the selection rules were not assessed under the proportionality test indicates that whenever certain sporting rules are necessary for the functioning of sporting competition, it will be left to the sports

⁴² See for example van den Bogaert, S., *op. cit. supra note 39*, p. 562, who, having argued that the selection measures in fact restricted the access to the labour market, points out that the provisions were breaching Article 49, as they did not satisfy a proportionality test, suggesting that a system based on a combination of world ranking, pre-qualifying rounds and wild cards would have ensured that the best athletes are enabled to participate in a competition, instead of limiting the number of participants from one country and leaving the decision entirely up the national association.

⁴³ *Deliège*, at paras 67 - 68.

bodies to decide how the legitimate aim is achieved, provided the adopted rules are objective and non-discriminatory. Although selection rules as such are certainly necessary to stage a sporting competition, strictly speaking, the Court should have examined whether a less restrictive selection system would have been available in the particular case, as only measures that are absolutely necessary for the existence of a sport should fall outside the scope of the provisions on free movement.

Having said that, there is always the possibility of justification under the *Bosman* “rule of reason”. It has to be remembered that the rationale behind the justification of rules necessary for the existence of sporting competition is that without them, there would be no free movement for athletes. In contrast to the extremely strict sporting necessity test, which simply ensures that there is sporting competition in the first place, the *Bosman* “rule of reason” takes into account sporting considerations such as how sport functions best. In this context it has been called for that the sports bodies should not only be able to justify restrictive measures under the public interest, but that, as part of the basic right of freedom of association, they should be able to invoke their right to self-regulation⁴⁴. This means that those who govern a sport should be given the competence to decide how their sport and sporting competitions should be organised, as long as the rules adopted are fair and equal. Such an interpretation would provide the Court with a legal base for letting sports associations adopt the selection rules they consider best for the functioning of their sport, enabling them to make the choice between a system, which ensures that athletes from different federations are represented, and a selection process purely based on sporting ability.

Admittedly, the differentiation between rules deemed to be a *conditio sine qua non* for the existence of a sport and measures which ensure the proper functioning of sporting competition and thus should be assessed under the *Bosman* “rule of reason”, is not very practicable. In many cases the Court will not have the necessary inside knowledge to judge which rules are strictly necessary for organisational reasons and which measures are put in place to ensure that sport

⁴⁴ See Röthel, A., “Anmerkung zu den EUGH Urteilen *Deliège* und *Lehtonen*”, (2000) 12 EuZW, p. 380; Gramlich, L., “Grundfreiheiten contra Grundrechte im Gemeinschaftsrecht”, (1996) 19 DÖV, p. 810.

functions the best way possible⁴⁵. In practice, a distinction between rules which are justified because they are necessary for the functioning of sport and rules being subject to the *Bosman* “rule of reason” is of relevance insofar, as discriminatory rules are only accepted under Article 39(1) by reason of their sporting necessity and may not be justified under the *Bosman* justificatory test.

3.2.3.3. The *Bosman* “Rule of Reason” in Case law - *Lehtonen*

Shortly after *Deliège*, the Court ruled on another case involving sporting measures, this time regarding transfer regulations adopted by the Belgian Basketball Federation. Having established that the provisions at issue constituted an obstacle to the free movement of workers⁴⁶, the Court in *Lehtonen* went on to apply the “rule of reason” introduced in *Bosman*, considering whether the restriction could be justified on non-economic grounds, concerning only sport as such⁴⁷. In this context, the Court recognised the aim of ensuring the regularity of sporting competitions as being legitimate⁴⁸, but ultimately left it to the national Court to decide whether the transfer rules were necessary to achieve the end pursued.

In contrast to selection rules, which are necessary to organise a tournament, transfer rules usually cannot be argued to be vital for the existence of a sport, as sporting competition would be possible without them. However, although basketball could probably exist without a transfer system, the *Bosman* “rule of reason” approach enables the Court to take into account that such rules are beneficial for the proper functioning sporting competition and to justify them on sporting grounds. The decisions in *Deliège* and *Lehtonen* show that the difference between rules which are a *conditio sine qua non* for the functioning of a sport and measures ensuring the “proper” functioning of sporting competition is often only marginal. The relevance of the distinction for indistinctly applicable measures is mainly methodological; however, it shows the importance of *Bosman*, opening up the possibility to justify

⁴⁵ Also, as pointed out by Weatherill, “there will always be arguments where the margin lies between rules necessary for the running of a sport and more intrusive rules which are the subject of legal scrutiny. Patterns of litigation reveal that typically sports bodies claim a much wider sphere of necessary organisational autonomy than is judged appropriate by individual sportsmen and -woman and by the Commission”, see Weatherill, S., “Anti-Doping Rules and EC Law”, (2005) 26(7) ECLR, p. 421.

⁴⁶ *Lehtonen*, at para 49.

⁴⁷ *Ibid*, at para 52.

⁴⁸ *Ibid*, at para 53.

non-discriminatory rules which are not strictly necessary for the functioning of sporting competition, but which follow a legitimate sporting interest.

3.2.3.4. Changing the Goalposts – *Meca-Medina*⁴⁹

The Court of First Instance's decision in *Meca-Medina* primarily deals with competition law, rather than the provisions on free movement; however, it is highly significant for the definition of the scope of Article 39, as the Court tackles the question under which circumstances sporting rules are considered to have an economic dimension.

The case involved two professional swimmers who had been banned for doping under the anti-doping rules by the International Olympic Committee (IOC). Having appealed against the decision at the Court of Arbitration for Sport (CAS), which reduced the ban from four to two years, the athletes subsequently lodged a complaint at the European Commission, claiming that the rules adopted by the IOC regarding the definition of doping, the threshold for defining a presence of a banned substance in the body as doping and recourse to the CAS restricted competition within the meaning of Articles 81 and 82. Since the Commission rejected the complaint, the two swimmers brought an action before the Court of First Instance.

The Court, referring to paragraph 8 of the *Walrave* judgment, held that the prohibitions enacted by the provisions on free movement “do not affect purely sporting rules, that is to say rules concerning questions of purely sporting interest and, as such having nothing to do with economic activity”⁵⁰. It continued to state that anti-doping regulations, like the rules on the composition of national teams or the selection rules at issue in *Deliège*, constituted purely sporting rules which, by their nature, fell outside the scope of Articles 39 and 49⁵¹. Having established that the campaign against doping did not pursue any economic objective⁵², the Court submitted “it must also be made clear that sport is essentially a gratuitous and not an economic act, even when the athlete performs it in the course of professional sport. In other words, the prohibition of doping and the anti-doping legislation concern

⁴⁹ Case T-313/02 *Meca-Medina & Majcen v. Commission* [2004] 3 CMLR 60.

⁵⁰ *Ibid.*, at para 41.

⁵¹ *Ibid.*

⁵² *Ibid.*, at para 44.

exclusively, even when the sporting action is performed by a professional, a non-economic aspect of that sporting action, which constitutes its very essence”⁵³.

The Court rejected the applicants’ argument that the anti-doping legislation at issue could not be purely sporting if it had economic repercussions for them, stating that such an interpretation was at odds with existing case law⁵⁴. In support of this view the Court explained that “it is precisely because sporting rules have economic repercussions for professional sportsmen and sportswomen and because those rules are considered to be excessive by some of those professionals that the dispute arises and that the question is raised whether those rules are purely sporting in nature (like the rules which gave rise to *Walrave, Delière* and *Donà*) or whether they cover the economic aspect of sporting activity (like the rules which gave rise to *Bosman, Lehtonen* and *Kolpak*)”⁵⁵.

In respect of the argument that the limit was fixed at too low a level, the Court expanded that even if the anti-doping rules were excessive in nature, this “would not result in them ceasing to be purely sporting rules [...], provided they remain limited to their proper object, which is the campaign against doping and the safeguarding of the spirit of fair play”⁵⁶. Furthermore, it was pointed out that even if it was proved that the IOC acted exclusively on the basis of purely economic, as opposed to social, interests, there was “every reason to believe that it fixed the limit at the level best supported by the scientific evidence”⁵⁷.

Although the result reached by the Court of First Instance, insofar as the anti-doping regulations at issue were held to be in accordance with EC law, has to be welcomed, the argumentation submitted is open to criticism⁵⁸. First of all, as already argued above⁵⁹, it is doubtful whether the decisions in *Walrave* and *Donà* can be interpreted to state a general exemption for purely sporting rules, rather than merely concerning rules on the composition of teams. This is supported by the decision in

⁵³ *Ibid*, at para 45.

⁵⁴ *Ibid*, at para 52.

⁵⁵ *Ibid*, at para 53.

⁵⁶ *Ibid*, at para 55.

⁵⁷ *Ibid*, at para 58.

⁵⁸ See in particular, Weatherill, S., *op. cit. supra note 45*, pp. 416 – 421; Schroeder, W., “Sportliche und wirtschaftliche Dimension des Sportverbandsrechts”, (2005) 1 SpuRt, pp. 20 – 24; Gregory, J., “From Rio to Meca: another step on the winding road of competition law and sport”, (2005) 64(1) CLJ, pp. 51-54.

⁵⁹ See point 3.2.2 above.

Deliège, where the Court, having referred to the exemption stated in *Donà*, concluded that the selection rules at issue did not relate to events between national teams and therefore the rules could be covered by the Treaty⁶⁰. Moreover, had the Court in *Deliège* adopted the same argumentation as the Court of First Instance in *Meca-Medina*, it would have considered the selection rules not to be restrictive owing to their purely sporting nature and not, as it did, because of their sporting necessity.

The attempt to establish a category of "purely sporting" rules to which the Treaty does not apply is not only artificial, but forgets that what is relevant under EC law is the effect a certain measure causes and not its objective⁶¹. Thus, it denies that usually rules regulating professional sport have economic repercussions⁶² and therefore principally come under the scope of EC law. The Court's submission that "sport is essentially a gratuitous and not an economic act, even when the athlete performs it in the course of professional sport", ultimately stands in contrast to previous case law establishing that sport is subject to Community law in so far it constitutes an economic activity within the meaning of Article 2 of the Treaty. Whether or not anti-doping regulations may be motivated by purely sporting reasons, the context in which they are applied is the organisation of professional sporting competitions, which undoubtedly constitutes an economic activity. Moreover, as pointed out above⁶³, to exclude rules from the scope of the Treaty by reason of their sporting nature opens up a dangerous path. To introduce an exception based on the motivation behind the adoption of a rule gives rise to legal uncertainty, as it generally will be very difficult to assess whether a rule has been motivated by reasons purely relating to sport or whether economic considerations may have been involved. This is demonstrated by the fact that the Court spends several paragraphs on the question whether the IOC might have followed economic interests and if it did, whether this would be relevant in the particular case.

⁶⁰ *Deliège*, at paras 43-44.

⁶¹ See also Schroeder, W., *op. cit. supra note 58*, p. 24; Gregory, J., *op. cit. supra note 58*, p. 53.

⁶² See also Weatherill, S., *op. cit. supra note 45*, p. 421, who points out that "the denial that such [sporting] practices carry economic consequences is ill-founded" and calls the attempt to find the purely sporting rule which is devoid of economic context an "unachievable quest".

⁶³ See point 3.2.2 above.

Instead of trying to justify the rules at issue because of their sporting nature, it would have been easier and more consistent with Community law principles to accept them by reason of their sporting necessity. In practice, anti-doping measures restrict athletes' economic activity in so far as they prevent them from participating in sporting competitions in cases of established use of performance enhancing substances. However, sporting competition could not function without anti-doping legislation, which ensures a comparability of results and as such is inherent in the organisation of sport. Thus, such legislation, if applied in an objective manner, does not fall foul Articles 39 or 49.

As far as the claim by the applicants that the rules at issue were excessive is concerned, it is submitted that there are no less restrictive means available successfully to combat doping than setting a certain limit for particular substances found in the body. Although it might be argued that sporting competition would still be possible if the limit set by the IOC was increased, one has to agree with the Court that it may be assumed that the IOC fixed the limit best supported by scientific evidence. Even though the Court in principle ought to assess the proportionality of a measure, it has to be considered that it would be very complicated to judge whether the adopted limit is supported by scientific evidence⁶⁴. Ultimately, as pointed out by the Commission, it should be left to the sports associations and sports scientists to choose the approach they feel is suited best efficiently to combat doping, as long as the anti-doping measures are clear, transparent, objective and non-discriminatory⁶⁵.

⁶⁴ However, as pointed out by Weatherill, the Court of First Instance's statement that excessive rules would escape the application of the Treaty provided they remain limited to their proper objective is "contradictory in the sense that an excessive rule would by definition not be so limited", see Weatherill, S., *op. cit. supra note 45*, p. 417.

⁶⁵ Case COMP/38158 *Meca-Medina & Majcen*, rejection of complaint of 1 August 2002, at para 50.

3.3. PERSONAL SCOPE OF ARTICLE 39

3.3.1. Footballers as Workers

Fundamentally, the freedom of workers under Article 39 applies to persons working as paid employees, as opposed to service providers who are self-employed and consequently fall within the scope of Article 49 of the Treaty. The notion of “worker” has a Community meaning and may not be interpreted according to national law⁶⁶. Hence, the ultimate authority to define its meaning and scope lies with the European Court of Justice, which ensures that the Member States cannot interpret the term in the light of their national laws and eliminate at will the protection conferred upon workers by the Treaty⁶⁷. According to the Court, the concept of worker “must be defined with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned”⁶⁸. Since the definition of worker determines the scope of one of the fundamental freedoms guaranteed by the Treaty, the Court has interpreted it quite broadly. Generally, a person will qualify as worker in the sense of Article 39 when he or she performs services for and under the direction of another person for a certain period of time, in return for which the person receives remuneration⁶⁹.

In respect of professional football players, the Court in *Bosman* has readily assumed their status as workers within the meaning of Article 39, without going into detail as to whether a professional footballer indeed provides a service under the direction of another person. However, the classification of professional football players as workers has been criticised by some writers who claim that high-class athletes with astronomic wages cannot be deemed workers, but should rather come under the scope of Article 49 of the Treaty⁷⁰. It is argued that certain players have achieved such a star-status through activities on and off the pitch, that they can

⁶⁶ See Case 75/63 *Hoekstra (née Unger) v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177, p. 184; *Lehtonen*, at para 45.

⁶⁷ *Hoekstra*, p. 184.

⁶⁸ *Lehtonen*, at para 45.

⁶⁹ Case 66/85 *Lawrie-Blum v. Land Baden-Württemberg* [1986] ECR 2121, at paras 16 and 17.

⁷⁰ See for example Fischer, U., “Die Spitzensportler des Mannschaftssports – Arbeitnehmer?”, (1997) 6 SpuRt, p. 181.

basically dictate the terms of their contracts and consequently do not work under the direction of another person. Such personalities with an international reputation within their sport usually receive a high income from advertising deals, which makes them economically independent from the, equally substantial, wages from their clubs⁷¹. The fact that these sportsmen have to train at a settled time and place is considered to be a necessity for any sporting activity, rather than an indication that they have to follow the directions of an employer.

Although there certainly are some superstars in football who may have more freedom than others when it comes to times of training or the negotiations of a new contract, this cannot change the fact that football players are workers within the meaning of Article 39. Generally, a club may not only stipulate when and how often a player has to come to training, but also impose substantial fines in case he does not comply with club rules, even if they relate to actions in his spare time. No matter how “big” a player is, if he consistently does not follow the instructions of the manager, he will eventually not be playing in competitive matches and therefore lose his star-status. Apart from that, for the qualification as a worker in a Community law sense, it does not matter whether a player has an income besides the wages from his club. What counts is that a professional footballer will have entered a contract of employment with a club for which he receives remuneration and the terms of which he has to respect.

3.3.2. Application of Article 39 according to Nationality

3.3.2.1. EU Citizens

Following the wording of Article 39(2), free movement is guaranteed to “workers of the Member States”, leaving it open whether only nationals from the Member States are covered or whether the provision also includes non-EC nationals resident and working within the Community⁷². Although it has been suggested that the founders

⁷¹ Evidently, the example of David Beckham comes to mind: additionally to his £ 100,000 a week salary from Real Madrid and his multi-million advertising deals with companies including Vodafone, Pepsi, Adidas and Police sunglasses, he has recently concluded a £ 40 million record-breaking deal with Gillette, making him the highest paid British advertising star of all time.

⁷² See Burrows, F., *Free Movement in European Community Law* (Claredon Press, Oxford, 1987), p. 124.

of the Treaty “intended to establish a common policy for all workers within the Community, irrespective of their nationality”⁷³, secondary legislation passed to implement Article 39 of the Treaty such as Regulation 1612/68, refers to nationals of the Member States only. Hence, the provisions on the free movement of workers only apply to EU citizens⁷⁴. In this context, it has to be kept in mind that the concept of Union citizenship under Article 17 of the Treaty is linked to a person being a national of a Member State, a question which is determined solely by the applicable national laws.

3.3.2.2. EU Citizens from the New Member States

When it comes to free movement, citizens from the new Member States do not yet enjoy the full rights of EU-citizens. Instead, the acts relating to the accession of the new Member States restrict the access of workers from those countries to the employment market in the old Member States for a transitional period⁷⁵. Having said that, the Court has held in the past that transitional agreements, being derogations from the principle of free movement, should be interpreted narrowly and therefore do not authorize old Member States to impose new restrictions on workers from new Member States⁷⁶. Moreover, despite the fact that the old Member States may maintain existing restrictions, they may not maintain such restrictions with regard to workers from the new Member States who have been employed in the old Member States prior to the date of accession⁷⁷. As a result, these workers and their families may fully rely on the rights granted by the provisions of Regulations 1612/68 and 1251/70⁷⁸. Free movement should be established by 2009; however, the possibility exists for an old Member State to ask the Commission for authorisation to continue

⁷³ Plender, R., “Competence, European Community Law and Nationals of Non-Member States”, (1990) 39 ICLQ, p. 599.

⁷⁴ However, as will be examined below, citizens from the new Member States do not yet have the full rights under Article 39.

⁷⁵ Acts on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, OJ 2003 L 326; it is important to note that the transitional agreements that have been introduced do not apply to Cyprus and Malta and only concern workers. Also, the new Member States may impose reciprocal restrictions on workers from the EU-15 Member States.

⁷⁶ Case 77/82 *Peskeloglou v. Bundesanstalt für Arbeit* [1983] ECR 1085.

⁷⁷ Case 9/88 *Lopes da Veiga v. Staatssecretaris van Justitie* [1989] ECR 2989, at para 11; Case C-279/89 *Commission v. United Kingdom* [1992] I-5785, at para 35.

⁷⁸ Case C-279/89 *Commission v. United Kingdom* [1992] I-5785, at para 38.

to apply national measures for a further two years, provided it is experiencing serious disturbances on its labour market.

3.3.2.3. Family Members of EU Citizens

A number of non-EU nationals have rights as family members of an EU citizen who is himself a migrant within the European Union. According to Article 11 of Regulation 1612/68⁷⁹, the spouse of a Union citizen working in another Member State and their children who are either under the age of 21 or dependent on him, have the right to take up any activity as employees throughout the territory of that particular Member State, irrespective of their own nationality⁸⁰. However, the worker's family does not have an independent right to work and the rights bestowed upon them by Regulation 1612/68 are conditional on the right of residence of the worker.

3.3.2.4. Association Agreements

Whereas the movement of Community workers is regulated by Article 39 of the Treaty, the rights of non-EU nationals who do not fall under the scope of Regulation 1612/68 are determined by international agreements between the Community and third countries. Under Article 310, in connection with Article 281 of the Treaty that provides it (unlike the European Union) with legal personality, the Community is empowered to conclude agreements with third countries "establishing an association involving reciprocal rights and obligations, common action and special procedure". The provisions of such association agreements form an integral part of the Community legal order and therefore the authority of interpretation lies with the Court.

Generally, international agreements are only binding upon the contracting countries or international organisations and do not develop a direct effect on

⁷⁹ It should be noted that Regulation 1612/68 will be amended by Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158, amended by OJ 2004 L 229/35 and OJ 2005 L 197/34. The Directive, which must be implemented by the Member States by 30 April 2006, merges into a single instrument the existing legislation on the matter.

⁸⁰ Article 2(2) of Directive 2004/38/EC will extend this right to the partner with whom the worker has contracted a registered partnership, provided that such registered partnerships are treated as equivalent to marriage in the host Member State, direct descendants of the spouse or partner under 21 or who are dependents and dependent direct relatives of the worker, his or her spouse or partner in the ascending line.

individuals. However, in respect of agreements between the Community and third countries, the Court has held that a provision in an international agreement has direct effect when, “having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementations or effects, to the adoption of any subsequent measure”⁸¹. Thus, whether an agreement that grants workers from an associated state certain rights within the Community can be invoked before the national courts in the Member States, always depends on the wording and content of the particular article in question⁸².

3.3.2.4.1 EEA Nationals

The movement of EEA nationals within the Community is regulated by the Agreement on a European Economic Area that came into force on 1 January 1994⁸³. Originally, the EEA Agreement was ratified by five EFTA countries, but after the accessions of Austria, Sweden and Finland to the European Union in 1995, the scope of the Agreement has been limited, on the EFTA side, to Norway, Liechtenstein and Iceland. According to Article 28 of the Agreement, workers from these EFTA countries have the right to free movement within the European Union. Even though the wording of Article 28 of the Agreement is identical to the provisions of Article 39 of the Treaty, it is a separate agreement on free movement between the Community and the EFTA and not just an extension of the scope of Article 39. In substance, the right effectively corresponds to the provisions on the free movement of workers in the Treaty and with the exception of the movement and residence rights of Article 18, EEA citizens in principle have the full rights of Union citizens⁸⁴. Besides, Article 6 of the Agreement states that the provisions of the Agreement, in so far as they are identical in substance to corresponding rules of the EC Treaty, shall be interpreted in conformity with relevant rulings of the European Court of Justice, even

⁸¹ See, in particular, Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, at para 14; Case C-262/96 *Sürül v. Bundesanstalt für Arbeit* [1999] ECR I-2685, at para 60; Case C-162/00 *Land Nordrhein-Westfalen v. Beata Pokrzeptowicz-Meyer* [2002] ECR I-1049, at para 19.

⁸² See in contrast Gutmann, R., “Schach, Sport und Europäischer Gerichtshof”, (1997) 2 SpuRt, p. 39, who considers association agreements to be directly effective as such, without taking into account the wording of the particular provisions.

⁸³ In this context, it should be noted that Liechtenstein joined the EEA on 1 May 1995.

⁸⁴ See Peers, S., “Towards Equality: Actual and Potential Rights of Third-Country Nationals in the European Union”, (1996) 33 CMLR, p. 16.

if they have been decided before the conclusion of the Agreement. Hence, the principles developed by the Court in its decisions in *Walrave* and *Donà* apply also to cases involving the free movement of EEA citizens. Furthermore, Article 7 of the Agreement grants family members of workers from an EEA state the same right of access to the employment market in the host Member State as family members of EU citizens.

3.3.2.4.2 Swiss Nationals

Despite being an EFTA member, Switzerland did not participate in the EEA Agreement, following a rejection of EEA membership by referendum. However, owing to the recent EC-Swiss Agreement on Free Movement of Persons, which came into force on 1 June 2002⁸⁵, Swiss nationals have rights similar to workers from the EEA, most importantly the right to take up employment in any EU Member State. Even though there is no case law on the matter yet, it is widely accepted that the agreement bestows directly effective rights to Swiss nationals⁸⁶.

3.3.2.4.3 Europe Agreements (EAs)

In the case of a number of Eastern European countries the Community has concluded so-called Europe Agreements, seeking to create an appropriate framework for the progressive integration of these states. In each of the ten Europe Agreements, identically worded provisions have been inserted which prohibit any discrimination concerning working conditions, remuneration or dismissal of workers from the associated countries legally employed in the territory of a Member State⁸⁷. Moreover, subject to minor exceptions, the legally resident spouse and children of a worker legally employed in the territory of a Member State have access to the labour market

⁸⁵ OJ 2002 L 114/6.

⁸⁶ Hedemann-Robinson, M., "An Overview of Recent Legal Development at Community Level in Relation to Third Country Nationals Resident Within the European Union, in Particular Reference to the Case Law of the European Court of Justice", (2001) 28 CMLR, p. 539.

⁸⁷ See Article 38(1) of the Europe Agreement with Bulgaria, OJ 1994 L 358/3; Article 38(1) of the Europe Agreement with the Czech Republic, OJ 1994 L 360/2; Article 36(1) of the Europe Agreement with Estonia, OJ 1998 L 68/3; Article 37(1) of the Europe Agreement with Hungary, OJ 1993 L 347/2; Article 37(1) of the Europe Agreement with Latvia, OJ 1998 L 26/3; Article 37(1) of the Europe Agreement with Lithuania, OJ 1998 L 51/3; Article 37(1) of the Europe Agreement with Poland, OJ 1993 L 348/184; Article 38(1) of the Europe Agreement with Romania, OJ 1994 L 357/2; Article 38(1) of the Europe Agreement with Slovakia, OJ 1994 L 359/2; Article 38(1) of the Europe Agreement with Slovenia, OJ 1999 L 51/3.

of that Member State, during the period of the worker's authorised stay of employment⁸⁸.

In its judgment in *Pokrzeptowicz-Meyer*, the Court held that the anti-discrimination provisions protecting nationals from countries associated by Europe Agreements⁸⁹ are capable of having direct effect, which means that workers from a contracting state are entitled to rely on it before national courts of the host Member State⁹⁰. Moreover, it has been confirmed in *Kolpak*, a case concerning nationality restrictions in German handball, that they are horizontally directly effective and apply to rules laid down by private parties such as sporting associations⁹¹.

Following the accession of the majority of EA-associated countries to the European Union, the scope of the Europe Agreements is now limited to Bulgaria and Romania.

3.3.2.4.4 Turkey Association Agreement⁹²

In contrast to the European Agreements, the Ankara Agreement does not confer any directly effective rights upon Turkish workers, but provides for the installation of a Council of Association, made up of representatives of the Member States, the EC and Turkey⁹³. The Council of Association shall issue decisions in order to provide Turkish workers with certain rights on the employment market in the Community.

Owing to political disagreements⁹⁴, the Council of Association has so far only issued two decisions concerning the movement of Turkish workers in the

⁸⁸ It should be noted that the question of the definition of the notion of spouse and, probably more controversially, children is determined by the national laws in the different Member States, as is the issue when they are deemed to be legally resident, see the Joint Declaration attached to the Europe Agreements.

⁸⁹ The particular case concerned Article 37(1) of the Europe Agreement with Poland.

⁹⁰ See *Pokrzeptowicz-Meyer*, at para 30; confirmed recently in Case C-438/00 *Deutscher Handballbund eV v. Maros Kolpak*, [2003] ECR I-4135, at para 30 with regard to Article 38(1) of the Europe agreement with Slovakia.

⁹¹ The Court, by analogy with its reasoning in *Bosman*, stated that a restriction of the scope to acts of public authority would result in an inequality in the application of the rules governing the movement of EA workers, see *Kolpak*, at paras 32 - 37.

⁹² "Agreement establishing an Association between the European Economic Community and Turkey", signed in Ankara on 12th September 1963, concluded on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (English version published in OJ 1973 C 113/1, hereinafter referred to as "the Ankara Agreement").

⁹³ See Article 22 of the Ankara Agreement.

⁹⁴ See Hailbronner, K., "Third Country Nationals and EC Law" in Rosas, A. & Esko, A. (eds), *A citizens' Europe* (SAGE Publications, London, 1995), p. 190.

Community⁹⁵. Both decisions, which have been held to be directly effective⁹⁶, grant a Turkish worker free access to any paid employment of his or her choice in the host Member State, if he or she has been in legal employment in the same Member State for a certain period of time, which in the more recent provision is set at a limit of four years⁹⁷. Moreover, Article 10 of Decision 1/80 guarantees Turkish workers non-discrimination “as regards remuneration and other conditions of work”. Thus, it emerges that Turkish workers, in addition to the rights granted to workers from EA countries, have an, albeit limited, right to employment access.

In respect of persons related to a Turkish worker, Article 7 of Decision 1/80 grants family members who have been authorised to join him or her under the laws of the Member States, free access to employment in the host Member State after five years⁹⁸.

3.3.2.4.5 Other Association Agreements

Apart from the Europe Agreements and the Association Agreement with Turkey, the Community has concluded association agreements with many other states: the Maghreb Co-operation Agreements (MCAs) with Algeria, Morocco and Tunisia⁹⁹, the Euro-Mediterranean Agreements (EMAs) with Morocco¹⁰⁰, Tunisia¹⁰¹, and Israel¹⁰², the Partnership and Co-operation Agreements (PCAs) with Russia¹⁰³, Ukraine¹⁰⁴, Kazakhstan¹⁰⁵, Kyrgyzstan¹⁰⁶, Moldova¹⁰⁷, Belarus¹⁰⁸, Uzbekistan¹⁰⁹, Turkmenistan¹¹⁰ and Armenia¹¹¹, Azerbaijan¹¹², Georgia¹¹³. Apart from that, the

⁹⁵ Decision No 2/76 of 20 December 1976 and Decision No 1/80 of 19 September 1980.

⁹⁶ Case C-192/89 *S.Z. Sevince v. Staatssecretaris van Justitie* [1990] ECR 3497, at para 19.

⁹⁷ Third indent of Article 6(1) of Decision No 1/80 of 19 September 1980.

⁹⁸ It should be noted that Article 7 does not contain a definition of the term “family members”. It has been suggested that the notion used in Decision 1/80 should be interpreted by analogy with Article 10 of Regulation 1612/68, see Peers, S., *op. cit.*, p. 25.

⁹⁹ All three OJ 1987, L 263 – 265.

¹⁰⁰ OJ 2000 L 70/2.

¹⁰¹ OJ 1998 L 132/14.

¹⁰² OJ 2000 L 147/3.

¹⁰³ OJ 1997 L 327.

¹⁰⁴ OJ 1998 L 049/3.

¹⁰⁵ OJ 1999 L 196/3.

¹⁰⁶ OJ 1999 L 96.

¹⁰⁷ OJ 1998 L 181/3.

¹⁰⁸ Signed March 1995; not yet in force.

¹⁰⁹ OJ 1999 L 229.

¹¹⁰ Signed May 1998; not yet in force.

¹¹¹ OJ 1999 L 239.

¹¹² OJ 1999 L 246.

Community has established special relations with a number of African, Caribbean and Pacific states under the Lomé Conventions¹¹⁴, now replaced by the Cotonou Agreement¹¹⁵.

Most of these agreements confer upon workers from associated countries the right not to be discriminated against nationals of the host Member State as regards working conditions. The MCAs with Algeria, Tunisia and Morocco, for example, include a non-discrimination clause in Article 40, which does not allow workers legally employed in a Member State to be put at a disadvantage compared to nationals and was held directly effective by the Court¹¹⁶. Similarly, the Cotonou Agreement also contains a clause ensuring equal treatment with regards to “working conditions, remuneration and dismissal”¹¹⁷, which is considered to be of direct effect¹¹⁸. Regarding the PCA with Russia, the European Court of Justice has recently confirmed in *Simutenkov*¹¹⁹ that the findings in *Kolpak* are also applicable to Russian athletes¹²⁰. It should be noted that the wording in the other PCAs is slightly different: whereas the Russia PCA states that the Community and its Member States “shall ensure” equal treatment as regards working conditions, remuneration and dismissal, the other PCAs merely require that the Community and its Member States “shall endeavour to ensure” such equal treatment¹²¹. Obviously, this non-discrimination obligation is less strongly formulated and it remains to be seen whether the Court will consider the provisions capable of having direct effect. Even less protection is offered by the Euro-Mediterranean Agreements, which do not address the issue of equal treatment for migrant workers at all¹²².

¹¹³ OJ 1999 L 205.

¹¹⁴ OJ 1991 L 229/3.

¹¹⁵ Signed 23.6.2000, OJ 2000 L 317, came into force on 1 April 2003, OJ 2003 L 83/69.

¹¹⁶ Case C-18/90 *Office nationale de l'emploi v. Bahia Kziber* [1991] I-199, at p. 225.

¹¹⁷ Article 13(3).

¹¹⁸ See Hedemann-Robinson, M., *op. cit. supra note 86*, p. 578.

¹¹⁹ Case C-265/03 *Igor Simutenkov v. Ministerio de Educación y Cultura* [2005] ECR I-2579.

¹²⁰ See also the earlier case of Valeri Karpin, a Russian footballer who was playing for Celta Vigo; there a Spanish Court ruled in view of the PCA with Russia that the player was to be treated the same as a Spanish national when it comes to the application of nationality restrictions, see the case commentary in (2001) 1 Spurt, p. 12.

¹²¹ See Article 23 of the agreement with Belarus, Moldova, Russia; Article 19 of the agreement with Kirgistan, Kazakhstan, Uzbekistan; Article 20 of the agreement with Azerbaijan and Georgia; Article 18 of the Agreement with Turkmenistan and Article 24 of the agreement with the Ukraine.

¹²² See Hedemann-Robinson, M., *op. cit. supra note 86*, p. 569.

3.3.3. Discrimination against Athletes from Associated Countries

3.3.3.1. Nationality Restrictions

Most association agreements protect nationals from contracting countries from discrimination regarding the conditions of employment. Thus, once a worker is legally employed within the territory of a Member State he or she has to be treated equally to the nationals of the host country. However, with the exception of EEA, Swiss and, to a limited extent, Turkish nationals, the majority of workers do not have the right to access the labour market in the Member States. Consequently, such workers can only be protected from nationality restrictions in sport if such a practice is considered to affect the conditions of employment, rather than the access to the employment market.

In respect of nationality restrictions in football, the Court in *Bosman* pointed out that such measures did not concern the employment of foreign players, on which there was no restriction, but put a limit on the extent to which clubs are allowed to field them in official matches¹²³. The Court concluded that the participation in matches was the essential purpose of a professional player's activity and that rules restricting that participation obviously affected the chances of employment¹²⁴. This paragraph has been interpreted in such a way that a limitation on the usage of certain players in a game constituted a restriction to employment access rather than a disadvantage in working conditions¹²⁵. However, the majority of commentators and the European Court of Justice in *Kolpak* concluded from *Bosman* that nationality restrictions in sport related to working conditions, inasmuch as they directly affect participation in official matches¹²⁶. Thus, the Court held that players from associated

¹²³ *Bosman*, at para 120.

¹²⁴ *Ibid.*

¹²⁵ See the decision *VfK Schifferstadt v. Deutscher Ringerbund* of LG Frankfurt a.M. of 28.07.1997, case no. 2-14 0 305/97, in agreement see the case commentary from Kahlenberg, H. in (1997) 5 SpuRt, p.171; see also the case of *TTC Zugbrücke Grenzau v. Deutscher Tischtennis Bund*, LG Frankfurt a.M. of 26.11.1997, case no. 2-14 0 254/97, where the appeal of a Polish player against nationality restrictions in German table tennis was rejected.

¹²⁶ See *Kolpak*, at paras 45-46; confirmed in *Simuntenkov*, at para 37; see also Gutmann, R., *op. cit. supra* note 82, p. 40; Gramlich, L., "Zweierlei Maß für Ausländer im (Liga-) Sport ? – Inländer-Gleichbehandlung und Völker- und Europarecht", (1998) 2 SpuRt, p. 64 who argues that the Court's statement in *Bosman* merely signified that nationality restrictions also affected the access

countries, although lawfully employed in a Member State, were at a disadvantage compared to players from EEA countries, as they had only limited opportunity to participate in certain matches¹²⁷.

Hence, when assessing nationality clauses in sport under EC law, a distinction has to be made between restrictions on the number of players from associated countries a club is able to sign on the one hand and rules that restrict the number of such players a club may field at a time on the other. Whereas it is possible to restrict the access of players from associated countries to the labour market, once a player is lawfully employed by a club, he has the same right to play as an EU national¹²⁸.

3.3.3.2. Transfer Restrictions

The Court has not had the chance yet to rule on the issue of transfer regulations concerning players from associated countries. In respect of transfer fees for out-of-contract players, all players transferring between two clubs from different EEA Member States are allowed to move freely since the 1st April 1999¹²⁹. However, this does not apply to domestic transfers¹³⁰, which means that players from associated countries may still be discriminated in this respect. Apart from that, the requirement of a transfer fee at the end of a player's contract relates to access to the labour market, rather than the conditions of employment. Firstly, the transfer fee is due at a point when the player is not actually employed by his former club any more; thus, it does not affect the working conditions of a player. Secondly, the effect of such a fee is to hinder the player from finding a new club, which means it constitutes an obstacle to the access to new employment. Although transfer fees for out-of-contract players have generally been abolished on a national level by now, it should be noted

to the labour market, which did not necessarily exclude them from having a negative effect on the conditions of employment.

¹²⁷ *Kolpak*, at paras 46 - 51.

¹²⁸ See also the decision of the Cour Administrative d'Appel, Nancy, which considered nationality restrictions in French basketball in breach of Article 37 of the Association Agreement with Poland, refusing a request to refer a preliminary question to the ECJ under reference to the *acte clair* doctrine, Case Lilia Malaja, judgment of 1 of February 2000, *Bangaly, Revue Française de Droit Administratif*, 2000, p. 693.

¹²⁹ See FIFA Circular No 616 of 4 June 1997.

¹³⁰ The FIFA Circular No 616 neither relates to transfers to or from third countries. Since Article 39 only applies to the movement of workers within the Community, such transfers are not covered, but could be affected by the rules on competition law.

that restrictions regarding domestic moves may be relevant in respect of Turkish nationals who have a right to access the employment market in their host Member State after having worked there for four years.

As commonly known, after the publication of the FIFA Circular No 616 and the abolition of transfer fees for out-of-contract players moving within the EEA, the Commission initiated proceedings in relation to the payment of transfer fees for players still in contract. However, whereas *Bosman* concerned access to employment in another Member State, one could argue that the requirement of mid-contract transfer fees relates to the conditions of employment.

According to Article 7(1) of Regulation 1612/68, working conditions concern in particular remuneration and dismissal. It has been argued that the notion has to be interpreted broadly, including all governmental and contractual provisions regulating the legal status of employees¹³¹. As will be explained below, the objection against the 1997 Regulations is based on the fact that players had no opportunity to terminate the contractual relationship before its expiry and move on to another engagement. It could be argued that equal treatment as regards to working conditions also relates to national laws granting the right unilaterally to terminate an employment contract. Having said that, even if a player from an associated country had the same right to terminate his contract as a domestic player, he still does not have the right to access the employment market in the host Member State. Hence, the 1997 Regulations would not have put a burden on him, considering that in case of the termination of his employment, he would not have been able to enjoy the right to free movement in any case.

3.4. DOMESTIC TRANSFERS

Evidently, the provisions on free movement cover transfers of EU citizens between clubs in two different Member States. In contrast, it is a matter of dispute if or when Article 39 also affects domestic moves. In *Bosman*, for example, the Court once again pointed out that the provisions on free movement of persons cannot be applied to “situations which are wholly internal to a Member State, in other words where

¹³¹ See Scheuer, A. in Lenz, O. (ed), “*Kommentar zum EU und EG Vertrag*” (3rd edn., Bundesanzeiger Verlag, Köln, 2003), p. 564.

there is no factor connecting them to any of the situations envisaged by Community law”¹³². However, in relation to domestic transfers of football players, it is still unclear in which cases a situation is deemed to be wholly internal and under what circumstances a strong enough Community law link has been established.

Having said that, the question whether domestic transfers are covered by Article 39 is mainly of academic interest, as the national associations sooner or later tend to adapt their transfer rules to changes made to the international transfer regulations resulting from the influence of Community law. Furthermore, it should be noted that transfers within a Member State may be affected by competition law, an issue which will be examined later on.

3.4.1. Transfers of Nationals within their Member State

At first sight, the scenario of a player moving from one club in his country of origin to another seems to lack any factor connecting it to EC law and Article 39 does not apply¹³³. However, taking into account the Court’s decision in *Singh*¹³⁴ and the fact that in recent times the Court has interpreted the concept of “wholly internal situation” more and more narrowly¹³⁵, one may wonder whether the case of a player returning home after having exercised his right to free movement in another Member State, would still be deemed “wholly internal” by the Court.

After the *Bosman* case, many national football associations, such as the English FA did not abolish fees for domestic transfers at first. Hence, in contrast to the situation in *Singh*, a footballer who returns home from a Member State where such transfer rules are still in place has not enjoyed more rights abroad than he has in his Member State of origin. However, even in the opposite case, whereby a player moves from a Member States where domestic transfer fees have been abolished back to his home country where such fees are still in place, it is doubtful whether

¹³² *Bosman*, at para 89.

¹³³ See Weatherill, S., “European Football Law”, *op. cit. supra note 13*, p. 375; Fischer, H., “EG-Freizügigkeit und bezahlter Sport, Inhalt und Auswirkungen des *Bosman*-Urteils des EuGH”, (1996) 2 SpuRt, p. 37; Kranz, A., “The *Bosman* Case: The Relationship between European Union Law and the Transfer System in European Football”, (1999) 5 Colum.J.Eur.L, p. 451.

¹³⁴ Case C- 370/90, *R. v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of the State for the Home Department* [1992] ECR I-4265.

¹³⁵ See for example Case C-60/00 *Mary Carpenter v. Secretary of State for the Home Department* [2002] ECR I-6279.

Article 39 applies. The hypothetical possibility that the same player might want to transfer to another club in his native state one day and would subsequently be subject to the payment of a domestic transfer fee cannot suffice to bring the scenario under the scope of Article 39. Apart from that, domestic transfer restrictions do not preclude or deter a national from leaving his home country in order to exercise his right to free movement in the sense that he would receive beneficial treatment if he had stayed at home, rather than moving abroad¹³⁶; the opposite is the case. Thus, it is submitted that the domestic transfer of a player in his home Member State, who has exercised his right to free movement in the past, should be considered as wholly internal, taking into account that his situation has not changed by his engagement abroad.

Moreover, even if such a player was considered to be protected by the Treaty, one may wonder whether the Community law link established by the fact that a player has been working in another Member State is strong enough to protect a player who has exercised his right to free movement a long time ago or who has only been abroad for a short period. For example, in January 2002 the German international Fredi Bobic moved from Borussia Dortmund to Bolton Wanderers, only to return to the German club Hannover 96 after six months. A year later, Bobic transferred from Hannover to Herta BSC Berlin. Considering that Fredi Bobic played in England for only six months, it is questionable whether this short stay established a strong enough cross-border link to bring his move from Hannover to Herta BSC under the scope of Article 39. This becomes even more evident if it is assumed that he did not transfer one year after having left Bolton, but after three or four years. It is further doubtful whether the fact that a player has exercised his right to free movement at one point in his career should automatically have the consequence that a later domestic transfer does not constitute a wholly internal situation. This is demonstrated by the case of Martin Hiden, an Austrian player who moved from Rapid Wien in January 1998 to Leeds United. After an unsuccessful stay in England, Hiden went back to his home country in July 2000 to play for Austria Wien, which he left three years later to return to Rapid.

¹³⁶ In this context see Case C-18/95 *F.C. Terhoeve v. Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345.

Taking into account the mentioned examples, it appears that in some cases where players who have been engaged abroad move between two clubs in their Member State of origin, the link to Community law seems rather weak. However, it would prove to be very difficult to introduce a criterion establishing when a player is still protected by Article 39 and when the situation is treated as being wholly internal. These considerations show that a broad interpretation of what situations are deemed to have a Community law dimension often results in rather arbitrary distinctions and although it is understandable that the Court wishes to extend the protection offered by Article 39 as far as possible, one may wonder whether a differentiation between nationals of the same Member State, purely based on the question whether a person has been exercising his right to free movement in the past, really makes sense.

3.4.2. EU Foreigner Moving Within Host Member State

Taking the example of Edwin Van der Sar, a Dutch national who moved from Fulham to Manchester United at the beginning of season 2005/06, it is debatable whether the fact that Van der Sar has already exercised his right to free movement by taking up employment in Britain constitutes a strong enough link to bring the transfer under the scope of Article 39. The majority of scholars take the view that the scenario of an EU citizen moving between two clubs in another Member State does not constitute a wholly internal situation and Article 39 applies¹³⁷. However, it could be argued that such a case should be treated analogously to the Court's case law in *Keck*. Before analysing whether domestic transfer rules are in fact comparable to selling arrangements, it is necessary to establish whether the Court's case law on Article 28 may in principle be invoked in connection with the provisions on free movement of workers¹³⁸.

In *Bosman*, the Court dismissed an application of *Keck* to the transfer system at issue, arguing that the transfer rules prevented the access of EU foreigners to the

¹³⁷ See Grisenthwaite, M., "The *Bosman* Judgment: after the Dust has Settled", (1996) 7(5) I.C.C.L.R., p. 204; Arens, W., "Der Fall *Bosman* – Bewertung und Folgerungen aus der Sicht des nationalen Rechts" (1996) 2 SpuRt, p. 43; Weatherill, S., "European Football Law", *op. cit. supra* note 13, p. 375.

¹³⁸ In favour, for example, Streinz, R., "*Europarecht*" (4th edn., C.F. Müller Verlag, Heidelberg, 1999), at para 681, who stresses that a limitation of scope as introduced in *Keck* regarding Article 28 should equally apply to national rules having the same effect on cross-border and domestic situations under Article 39 of the Treaty.

labour market in another Member State. Still, the Court did not reject the application of the principles in *Keck* to Article 39 as such. Besides, in *Alpine Investments*¹³⁹ the Court seemed to be prepared to allow an analogy to *Keck* case law in connection with the freedom of services. However, as in *Bosman*, the Court ultimately considered that measure at issue had to be distinguished from the selling arrangements in *Keck*, arguing that it was directly preventing market access. The decisions in *Alpine Investment* and *Bosman* imply that, in principle, the findings in *Keck* are also valid for cases involving the free movement of workers in the sense that measures not affecting access to the market in another Member State may not be covered by Article 39. Moreover, in *Graf*, the Court held that “in order to be capable of constituting such an obstacle [to free movement], they [indistinctly applicable measures] must affect access of workers to the labour market”¹⁴⁰, which suggests that rules not affecting market access escape the application of the provisions on the free movement of workers.

In contrast to the Court, which has never examined to what extent *Keck* could be relevant as regards to Article 39, the issue was touched upon in the opinions of several Advocates-General. Advocate-General Lenz, for example, suggested in *Bosman* that by analogy with the case law on Article 28, a distinction might be drawn between measures regulating access to occupational activity and measures which are directed more to the exercise of that activity¹⁴¹. In contrast, Advocate-General Albers rejected the idea of applying *Keck* in connection with the provisions on the free movement of workers¹⁴². According to the Advocate-General, selling arrangements affect trade in goods only very indirectly, as they are not product related and do not necessarily affect those who import or export a product, but only the subsequent sale to the final customer. Thus, rules on the exercise of a profession were submitted to be much closer to product-related requirements than to the rules on selling arrangements, since rules on exercise, like product-related rules, must be complied with directly by a citizen of the Union who wishes to assert the freedom

¹³⁹ Case C-384/93 *Alpine Investments BV v. Minister van Financien* [1995] ECR I-1141.

¹⁴⁰ *Ibid*, at para 23.

¹⁴¹ AG Lenz in *Bosman*, at para 205.

¹⁴² AG Albers in *Lehtonen*, at paras 46-50, for a more detailed analysis see Albers, S., “Vom Diskriminierungs- zum Benachteiligungsverbot“ in Tomandl, T. (ed), *Der Einfluß europäischen Rechts auf das Arbeitsrecht* (Wilhelm Braumüller Verlag, Vienna, 2001).

under Article 39¹⁴³. Moreover, the Advocate-General took the view that there was no reason to introduce a restriction of the scope of Article 39 by analogy with the *Keck* case law, as the freedom of movement for workers is already limited by the fact that it may be relied on only in cross-border situations.

The most extensive analysis on the application of Article 39 to non-discriminatory rules with reference to the *Keck* case law was undertaken by Advocate-General Fennelly in *Graf*¹⁴⁴. Having pointed out that the motivation which led to the adoption of the distinction between product rules and selling arrangements was to establish the circumstances in which market access was affected¹⁴⁵, the Advocate-General tried to transmit the principles in *Keck* to Article 39 of the Treaty. He thereby differentiated between two kinds of non-discriminatory national rules with which workers from other Member States have to comply¹⁴⁶. Firstly, measures restricting free movement by directly affecting access to the employment market such as national provisions which require certain skills or qualifications and, like product related requirements, tend to subject migrant workers to a dual regulatory regime or rules as in *Kraus* which are sufficiently closely bound up with market access to be subjected to a similar regime. Secondly, national regulations that limit commercial freedom, but do not result from a formal condition of market participation and as such do not affect access to the employment market. In reference to the opinions of the Advocates-General Lenz and Albers, Advocate-General Fennelly considered his analysis to be in agreement with Advocate-General Lenz's proposed distinction between rules regarding market access and rules merely governing the exercise of an economic activity and pointed out that the apparent disagreement with Advocate-General Albers stemmed from a different understanding of what is meant by rules governing the exercise of an economic activity¹⁴⁷. This

¹⁴³ See also Kranz, A., *op. cit. supra note 133*, p. 445, who argues that "measures directed at traders and not at goods cannot be seen to hinder the circulation of goods, whereas regulations concerning workers could have an adverse impact on their free movement, rendering the application of *Keck* to Article 48 unrealistic".

¹⁴⁴ Case C-190/98 *Volker Graf v. Filzmoser Maschinenbau GmbH* [2000] ECR I-493.

¹⁴⁵ AG Fennelly in *Graf*, at para 19.

¹⁴⁶ *Ibid*, at paras 31 – 33.

¹⁴⁷ Obviously, AG Albers considered national measures requiring certain skills or qualifications as affecting the exercise of an occupation, rather than governing access to the employment market and therefore argued against the adoption of the distinction suggested by AG Lenz in *Bosman*, see AG Albers in *Lehtonen*, at para 48.

view has been agreed with by Advocate-General Albers himself, who considered Advocate-General Fennelly's opinion not to stand in contradiction to his own¹⁴⁸.

Applying the findings of Advocate-General Fennelly to the case of domestic transfer regulations, it emerges that measures requiring the payment of a fee if a player is moving between two clubs in the same Member State cannot be classified as formal barriers to market access. In contrast to the scenario in *Bosman*, in such a situation the player is already working in the host Member State and the transfer rules do not prevent him from accessing the labour market in another Member State, but impede him in his efforts to move on to a new engagement in the same Member State. The rules governing domestic transfers of footballers are indistinctly applicable and do not put foreign players at a disadvantage, since generally more nationals will move within their country of origin than players from other Member States. Furthermore, they do not require foreign players to comply with conditions they would not be subject to in their home Member State and as such are more closely related to selling arrangements than to product rules. Taking into account that domestic transfer rules apply exclusively to the territory of a Member State and do not restrict cross-border movement, it is submitted that they do not fall within the scope of the provisions on free movement¹⁴⁹. As Advocate-General Fennelly put it: "In the normal case, the migrant worker must take the national employment market as he finds it"¹⁵⁰, which, in the case of a football player moving domestically in another Member State, means that once he has gained access to the employment market, he is subject to indistinctly applicable measures limiting his commercial activity in the host Member State.

3.4.2.1. The Problem of Reverse Discrimination

Considering the fact that Article 39 generally does not apply to domestic moves of players within their home Member State, it is possible to envisage a scenario whereby a club would have to pay a transfer fee for a national player coming from a

¹⁴⁸ Albers, S. in Tomandl, T. (ed), *op. cit. supra note 142*, p. 10.

¹⁴⁹ See also Fischer, H., *op. cit. supra note 133*, p. 37; in a circulation paper, published on the internet after the *Bosman* case, the Commission effectively came to the same conclusion, albeit without referring to *Keck*, simply stating that in cases of EU foreigners moving within a Member State "there is neither indirect discrimination against a Community player nor any restriction on the free movement of persons" see www.europa.eu.int/comm/sport/key_files/circ/b_Bosman_en.html.

¹⁵⁰ AG Fennelly in *Graf*, at para 32.

team in the same Member State, but could engage a player from another Member State for free. Hence, in such a situation a club looking for a new striker is more likely to employ an EU foreigner than a domestic player. The disadvantage national players may be placed at in comparison to players from other Member States by the application of the provisions on free movement becomes even more clear if it is assumed, contrary to the view proposed above, that the transfer of an EU foreigner moving within a Member State is covered by Article 39. In this case a national player and an EU foreigner moving between the same two clubs within a Member State might be treated differently, depending on their nationality: whereas the former is protected by the Treaty, the latter is not.

The effect caused by the application of Article 39 that national workers cannot invoke rights in their Member State of origin, which workers from other Member States could claim there, is generally referred to as “reverse discrimination”. The European Court of Justice, taking into account that the provisions on free movement may not be relied upon in a so-called “wholly internal” situation, has so far accepted that as a result of the application of EC law, persons from another Member State could be put at an advantage compared to nationals from the host Member State¹⁵¹. However, as the example of *Morson and Jhanjan*¹⁵² shows, the “internal situation” approach sometimes leads to distinctions which might be considered as rather arbitrary. Be that as it may, cases involving reverse discrimination of nationals against EU foreigners are generally thought to be outwith the scope of the Treaty¹⁵³ and it is left to the national laws of the Member States to

¹⁵¹ See for example Case 175/78 *R. v. Saunders* [1979] ECR 1129, involving a British national trying to challenge an order which excluded her from certain parts of her own country. The Court, having established that there was no factor connecting the case “to any of the situations envisaged by Community law” held that Ms. Saunders could not rely on Article 48 (now 39); Joined Cases C-29-35/94 *Criminal proceedings against Jean-Luis Aubertin and others* [1995] ECR I-301 regarding a French regulation requiring French nationals to hold a diploma in order to operate a hairdressing salon, whereas hairdressers from other Member States could operate a salon in France without being subject to such a requirement

¹⁵² Cases 35 & 36/82 *Morson and Jhanjan v. Netherlands* [1982] ECR 3723, where two Dutch nationals working in the Netherlands were not allowed to bring their Surinamese parents into the country to reside with them, as this was considered to be a wholly internal situation. However, had they been nationals from any other Member State working in the Netherlands, they would have been covered by Article 10 of Regulation 1612/68.

¹⁵³ See Albers, S. in Tomandl, T. (ed.), *op. cit. supra note 142*, p. 13; Streinz, R., *Europarecht, op. cit. supra note 138*, at para 685; Vahrenwald, A., “Am I So Round with You as You with Me? The *Bosman* Case Before the European Court of Justice”, (1996) 7(4) *EntLRev*, p. 154; Hilf, M. & Pache, E., “Das *Bosman* Urteil des EUGH”, (1996) 18 *NJW* p. 1174.

ensure that their nationals are not discriminated as regards to workers from other Member States¹⁵⁴.

Recently, attempts have been made to find a legal base in Community law which would provide protection for nationals subject to reverse discrimination. In this context, the concept of Union citizenship has been argued to contain a general prohibition of discrimination which does not allow the Member States to put their own nationals at a disadvantage to EU foreigners¹⁵⁵. So far the Court has not recognised claims by EU citizens trying to rely on Article 18 against their Member States of origin and has adhered to the internal situation concept, pointing out that a purely hypothetical prospect of exercising one's right to free movement does not establish a sufficient connection with Community law to justify the application of Article 39¹⁵⁶.

However, the Court has now breathed new life into the concept of Union citizenship, stressing that it "is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for"¹⁵⁷. Moreover, in an earlier decision, it was stated that "Article 8(2) [now 17] of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 [now 12] of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty"¹⁵⁸. The decisions in *Grzelczyk* and *Martínez Sala* clarified that Union citizens lawfully residing in another Member State may claim the same rights as nationals in the host Member States, irrespective of their classification as workers. Nevertheless, it may be doubted whether the Treaty articles on the Union citizenship in connection with Article 12 offer protection for Union citizens being subject to reverse discrimination. The Court has emphasised in *Martínez Sala* that the non-discrimination principle is

¹⁵⁴ See Case C-132/93 *Steen II* [1994] ECR I-2715, at para 10 and the opinion of AG Darmon, who mentioned the German Gleichheitsgrundsatz embodied in Artikel 3 Grundgesetz in this respect.

¹⁵⁵ See Borchardt, K., "Der sozialrechtliche Gehalt der Unionsbürgerschaft", (2000) 29 NJW, p. 2059.

¹⁵⁶ Case 180/83 *Hans Moser v. Land Baden-Württemberg* [1984] ECR 2539, at para 18; Case C-299/95 *Friedrich Kremzow v. Republik Österreich* [1997] ECR I-2629, at para 16.

¹⁵⁷ Case C-184/99 *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, at para 31.

¹⁵⁸ Case C-85/96 *Martínez Sala v. Freistaat Bayern* [1998] ECR I-2691, at para 62.

limited by the scope of application *ratione materiae* of the Treaty and although such a restriction of scope was not expressly mentioned in *Grzelczyk*, it is interesting to note that in a later case, the Court referred to the paragraph in *Grzelczyk* cited above, but inserted the words “within the scope *ratione materiae* of the Treaty”¹⁵⁹. As the Treaty does not cover “wholly internal situations”, it is evident that Articles 12 and 18 do not apply to situations whereby EU nationals, as a result of the application of EC law, cannot claim the same rights in their home country as migrant workers from other Member States. This is underlined by the fact that both Article 12 and 18 refer to the scope of application of the Treaty¹⁶⁰. It has been suggested that the EU Charter of Fundamental Rights will provide general protection from discrimination irrespective of a cross-border context¹⁶¹; however, it should be noted that again, Article 21 of the Charter (Article II-81(2) Constitutional Treaty) guarantees the right to non-discrimination on grounds of nationality only “within the scope of application of the Treaty”.

Returning to the issue of domestic transfer fees, it is clear that the case of a player moving between two clubs in his Member State of origin is not covered by the provisions on free movement (at least if he has never exercised his right to free movement) and that he cannot invoke EC law to combat a possible discrimination as regards players from other Member States. Having said that, one could envisage problems arising from the fact that some clubs might be trying to circumvent the requirement of a transfer fee for domestic players by “parking” them for a short period of time at a partner-club in another Member State, before taking them back without having to pay a fee¹⁶². However, the whole issue of different treatment of domestic and cross-border transfers in relation to the provisions on free movement has lost in relevance, as the domestic transfer system has come under scrutiny from the Commission under the competition law rules.

¹⁵⁹ Case C-224/98 *D’Hoop v. Office nationale de l’emploi* [2002] ECR I-6191, at para 28.

¹⁶⁰ See also Albers, S. in Tomandl, T. (ed), *op. cit. supra note 142*, p. 15.

¹⁶¹ Scheuer, A. in Lenz, O. (ed), *op. cit. supra note 131*, p. 562.

¹⁶² For a more detailed explanation of the matter see Weatherill, S., “Comment to the Bosman Case”, (1996) CMLR, p. 1020.

4. THE 1997 FIFA REGULATIONS UNDER ARTICLE 39

4.1. ARTICLE 12(4) – OBSTACLE TO FREE MOVEMENT?

When analysing the 1997 FIFA Regulations, it may be difficult at first to understand the Community officials' reservations against the football transfer system at the time. Why should a club that is interested in a particular player employed by another club not be allowed to buy out the remainder of the player's contract, provided that all three parties involved come to an understanding? However, it was not so much the above mentioned scenario where both parties mutually agree to end the employment contract that attracted the attention of the Commission, but the fact that the 1997 FIFA Regulations did not allow a player to move without the consent of his club. Article 12(4) provided that a player could not transfer to another club unless the three parties – the club he was leaving, the player himself and the club he was joining – all concurred. Moreover, in Circular No 616 from the 4th of June 1997, which set out certain decisions of the FIFA Executive Committee on the status of players, FIFA expressly stated that the unilateral termination of a contract by a player was to be regarded as a breach of Article 12(1) of the 1997 Regulations. This meant that a player who had breached the contract with his club would not have been granted a licence by the association in question and thus would not have been eligible to play for any other club.

It has already been pointed out that rules laid down by sports bodies are subject to the application of EC law in general and the Treaty freedoms in particular. Furthermore, it has been established that indistinctly applicable measures such as the transfer regulations at issue may fall within the scope of Article 39 of the Treaty if access to the employment market in another Member State is restricted. A rule that does not allow a player to terminate the employment contract with his current club in order to play for a club in another Member State undoubtedly affects his access to the employment market. Thus, such a restriction would presumably be infringing the provisions on free movement, unless it can be justified under the "rule of reason" test

introduced in *Bosman*. However, such an application of Article 39 would have the consequence that any national law allowing employment contracts that cannot be unilaterally terminated at any time would be deemed to restrict free movement. Considering the fact that if employees were able to leave their job whenever they wanted, the European economy would be in turmoil, it is doubtful whether Article 39 can be interpreted to include an absolute prohibition of binding employment contracts.

The Community does not have the competence to rule on employment law matters such as the maximum length of employment contracts or sanctions imposed on an employee for breach of contract. Thus, it has been argued that the question whether a player was allowed to terminate his contract prematurely to leave for another club should be determined by national employment laws and did not fall within the scope of the provisions on free movement¹⁶³. Obviously, if the legal assessment of football transfer rules would be left exclusively to the national courts, the transfer system would be treated differently in each Member State. As a consequence, players in one Member State would be allowed to leave after, for example, four years, while others would have to wait for five, depending on the applicable national employment laws. Although this would cause major difficulties with regard to the application of the transfer system and legal certainty, it has been pointed out that such a state of affairs would have to be regretted, but cannot be of Community concern¹⁶⁴.

However, what if a Member State allowed the conclusion of employment contracts binding the employee for a duration of ten years, or even indefinitely? Considering the restriction put on a worker thereby, it has to be assumed that such a provision would be in breach of Article 39 and could not be justified by public policy reasons. It has already been mentioned that a certain stability of employment contracts is necessary for a working economy, which means that national legislation preventing an employee from unilaterally terminating his contract for a given length of time falls outside the scope of Article 39. The question is when such legislation is restricting an employee's right to free movement to an extent that it may not be

¹⁶³ Klingmüller, A. & Wichert, J., "Die Zulässigkeit von Ablösesummen für vertraglich gebundene Profifußballspieler", (2001) 1 SpuRt, p. 4.

¹⁶⁴ *Ibid.*

justified any more? Although it will be very difficult to define the maximum period of time after which a worker's right to free movement prevails over the public interest in the stability of contracts, it is important to point out that overly restrictive provisions of the Member States may breach Article 39¹⁶⁵. Thus, the determination of the maximum length of employment contracts cannot be exclusively left to the Member States, but may have a Community law dimension.

Even if it is assumed that the national laws in the Member States concerning the maximum length of employment contracts are not unnecessarily restrictive and players would have had the possibility to challenge the 1997 Regulations before the national courts, this does not mean that the provisions on free movement do not apply. Community competence in free movement matters exists parallel to the Member States' competence regarding employment law. Thus, measures adopted by private parties such as FIFA may be assessed under Article 39, as well as national employment law.

It has already been established that the 1997 Regulations restricted free movement in the sense that they did not give a player the possibility to take up employment in another Member State whilst under contract with another club. Since a certain restriction is the very essence of any contract, it is evident that measures ensuring that contracts are honoured are not necessarily infringing the provisions on free movement. However, what brought the 1997 Regulations under the scope of the prohibition laid out in Article 39(1), is the fact that the football governing bodies limited player movement to an extent that could not be justified by an interest in contract stability. The burden put on the player becomes obvious when it is considered that national employment laws, which reflect the compromise adopted by the Member States as regards the conflict of interests between employers and employees, do not generally allow the conclusion of irrevocable long-term contracts, but provide for a maximum duration. Additionally, workers under contract can not usually be prevented from taking up employment with another company, but will have to pay compensation for breach of contract. In Germany, for example,

¹⁶⁵ See also Commission Case IV/36.583 *SETCA –FGTB/FIFA*, rejection of complaint of 28 May 2002, at para 18, where the Commission states that national legislation imposing obligations in the case of breach of contract does not infringe Community law, as long as they do not create a disproportionate restriction on free movement.

employees such as footballers may be bound up to five years after the expiry of which they are given the possibility to resign, even if the duration of the contract was agreed to be longer¹⁶⁶. An employee may even leave before that, but his employer will be eligible for compensation for loss incurred as a result of the breach of contract¹⁶⁷. Thus, the conclusion of a contract between an employee and an employer cannot be made dependant on the approval of the former employer, even if the employee has breached his old contract. In some countries, the employer and employee may agree on a non-competition clause, which prohibits the employee from working for a competitor for a given length of time after the termination of the employment contract. However, such a restriction generally has to be limited in time and scope. In Austria, for example, it may only apply for a year after the termination of the employment relationship, is restricted to direct competitors of the former employer and may not put an excessive burden on the employee¹⁶⁸. As the restriction put on players by Article 12(4) applies indefinitely and is not limited to direct competitors of the old club, it is evident that it could not be interpreted as a valid and enforceable non-competition clause under Austrian law.

Taking English law as an example, it emerges that, although courts will not order the performance of a contract for personal services, a court may by injunction prevent the breach of the negative obligation not to work for a rival employer. In *Warner Bros Inc v. Nelson*¹⁶⁹, the actress Bette Davis was successfully prevented from breaching her contract with Warner Brother, which effectively meant she could either honour the contract or work in another line of business. In contrast, the court refused to grant an injunction in the case of long-term agreements, such as a five-year management contract with a pop group¹⁷⁰ or a two-year management contract with a boxer¹⁷¹. In the latter case, the court pointed out that the longer the term for which an injunction was sought, the less readily will the injunction be granted,

¹⁶⁶ § 624 Bürgerliches Gesetzbuch (Civil Code).

¹⁶⁷ See Klingmüller, A. & Wichert, J., *op. cit. supra note 163*, p. 3; for a closer examination of the damages a club may receive in case of a breach of contract by the player under German law, see Rüsing, J. & Schmülling, M., "Ersatzansprüche eines Profifußballvereins nach fristloser Kündigung eines vertragsbrüchigen Lizenzspielers", (2001) 2 SpuRt, pp. 52 – 55.

¹⁶⁸ § 36 Angestelltengesetz (Law on Salaried Employees).

¹⁶⁹ *Warner Bros Inc v. Nelson* [1936] 3 All ER 160.

¹⁷⁰ *Page One Records Ltd v. Britton* [1967] 3 All ER 822.

¹⁷¹ *Warren v. Mendy* [1989] 3 All ER 103.

concluding that a two year period in the context of the comparatively short professional life of a boxer was too long, as it would effectively result in the boxer having to return to the plaintiff's management or give up boxing. In relation to other sports cases, the decision in *Warren v. Mendy* has given rise to the view that an injunction will not be granted if the athlete was hindered from practicing his sport for anything other than a short duration¹⁷². Although it is unclear where the court would draw the line between short- and long-term contracts, there can be no doubt that a rule generally prohibiting a player to leave his current employer for another club is in breach of English law, as it may prevent a player from practicing his trade for a very long time.

Considering that, the 1997 Regulations evidently constituted an obstacle to free movement because they did not allow a player to terminate his contract prematurely, which is emphasised by the fact that he would probably have been able to do so under applicable national law. However, it has been argued that professional football is different from other economic activities in the sense that there is a special requirement for contract stability. Since indistinctly applicable measures affecting access to the employment market in other Member States may be justified on non-economic grounds purely relating to sport, it is necessary to assess whether the 1997 Regulations could have been justified for sporting reasons.

4.1.1. Justification under the *Bosman* “Rule of Reason”?

So far the Court has recognised the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players¹⁷³ and the objective of ensuring the regularity of sporting competitions¹⁷⁴ as possible reasons to justify a restrictive sporting rule, provided the adopted measure is suitable to achieve the desired end and does not go beyond what is necessary for that purpose.

The three main arguments brought forward in defence of the 1997 Regulations were: firstly, that the rules were needed to ensure a stability of contracts,

¹⁷² See McCutcheon, P., “Negative enforcement of employment contracts in the sports industries”, (1997) Legal Studies, pp. 73–74.

¹⁷³ *Bosman*, at para 106.

¹⁷⁴ *Lehtonen*, at para 53.

guaranteeing the proper functioning of sporting competition, secondly, that the transfer regulations were necessary to retain a competitive balance between clubs and thirdly, that the transfer fees were needed to encourage youth development. In view of the mentioned case law, these objectives have to be considered as being legitimate under Article 39(1) of the Treaty. However, the 1997 transfer rules would only have escaped the application of Article 39(1) if they were suitable to achieve the proposed aims and fulfilled the requirement of proportionality. Since the goals of achieving a competitive balance and encouraging youth development are closely linked, they shall be assessed together, before moving on to the more extensive subject of contract stability.

4.1.1.1. Competitive Balance/Youth Development

After *Bosman*, many clubs offered their promising young players long-term contracts to make sure they would not leave “on a Bosman” and the teams would be able to receive a transfer fee. It was believed that like this, small clubs could not only recover the costs involved in training youngsters, but were offered the chance to generate substantial income from transfer fees in case one of their young prospects turned out to be a success. Thus, it was argued that a lot of smaller clubs, especially in the lower divisions, relied on the transfer funds from the sale of their youth players and without this income would not only give up their involvement in youth development, but would face bankruptcy.

The argument that transfer regulations were indispensable for a sporting equilibrium as well as youth development had already been raised in connection with the transfer system at issue in *Bosman*. The Court at the time acknowledged the need for a certain equality and uncertainty of outcome in football, but considered the transfer rules at issue an inadequate means of maintaining a financial and competitive balance¹⁷⁵. In this context the Court pointed out that the transfer system neither precluded the richest clubs from securing the services of the best players, nor prevented the availability of financial resources from being a decisive factor in competitive sport and thus, was not suitable to achieve the desired end¹⁷⁶. As regards the aim of giving clubs an incentive to invest in youth development, the Court

¹⁷⁵ *Bosman*, at para 106.

¹⁷⁶ *Ibid*, at para 107.

admitted that the prospect of receiving transfer fees was indeed likely to encourage clubs to seek new talent and train young players. However, the Court pointed out that, owing to the difficulties in predicting a young player's sporting future, for the clubs the prospect of receiving such fees was too uncertain and thus, could not be a decisive factor in recruiting youngsters¹⁷⁷. Moreover, the transfer fees were criticised for being unrelated to the actual costs incurred by clubs for the training of young players.

Despite the fact that the 1997 FIFA Regulations did not provide for transfer fees for out-of-contract players any more, they effectively achieved the same result as the pre-*Bosman* system, the only difference being that the clubs received the transfer fees through mid-contract transfers. Admittedly, players could theoretically refuse to enter into long-term contracts, however, few players would have the necessary star-status to negotiate such terms. Hence, the Court's reasoning in *Bosman* is also applicable to the 1997 transfer system. In particular, taking into account the transfer activity at the time¹⁷⁸, the Court's argument that transfer fees do not prevent the rich clubs from recruiting the best players proved to be equally true for the post-*Bosman* system. Apart from that, the uncertainty of receiving a transfer fee also remained in the new system. Thus, it seems unlikely that the Court – had it had the chance to assess the 1997 Regulations – would have considered them to be justified.

However, it should be pointed out that economic research suggests that long-term contracts do in fact enhance competitive balance and encourage clubs to invest in the training of young players¹⁷⁹. Having said that, even if this proposition is acknowledged to be true, a provision impeding free movement will only fall under

¹⁷⁷ *Ibid*, at para 108.

¹⁷⁸ The £ 48 million world record move of Zinedine Zidane from Juventus to Real Madrid in 2001 and the £ 37 million transfer of Luís Figo from Barcelona to Real Madrid in 2000 have already been mentioned.

¹⁷⁹ See Feess, E. & Mühlheusser, G., "The impact of transfer fees on professional sports: an Analysis of the New Transfer System for European Football" (2003) 105(1) *The Scandinavian Journal of Economics*, p. 139; Antonioni, P. & Cubbin, J., "The *Bosman* ruling and the emergence of a single market in soccer talent", (2000) 9(2) *European Journal of Law and Economics*, pp. 157 – 173; in contrast see "Time for a New Approach: The International Transfer System", a FIFPRO Report to the European Commission, 9.2.2001, available at www.fifpronet.com, in which it is argued that the 1997 transfer system widened, rather than narrowed the increasing gap between rich and poor clubs and as a result, the investment in training and development programs has mainly been present in the big clubs.

the “rule of reason” if it does not go beyond what is necessary to achieve a legitimate aim. As will be demonstrated below, the burden put on players by irrevocable long-term contracts is such that very convincing arguments would be needed to defend such a transfer system for sporting reasons. Although the aims of retaining a sporting equilibrium and of encouraging investment in youth development must be considered as legitimate, it is doubtful whether long-term contracts could be proved to be the only and best way to achieve the objectives in question. On the other hand, the alternative suggested by Advocate-General Lenz and the Court in *Bosman* - re-distribution measures - is not universally accepted by economists as a suitable means to achieve the desired objectives¹⁸⁰. This leaves the unsatisfactory verdict that in order to give a final judgment on the question whether the 1997 Regulations were in fact necessary to ensure a competitive balance between clubs and to encourage the recruitment of young players or whether there would have been less restrictive means available, more extensive economic research and empirical evidence would be required. In any case, it could be argued that the 2001 Regulations are an example that the aims in question can be secured by a less restrictive transfer system.

4.1.1.2. Stability of Contracts

The second and more important argument in favour of the 1997 Regulations is that long-term contracts are needed to ensure that contractual obligations are honoured and players cannot leave their clubs at any given time. As pointed out above, it is undoubtedly necessary in the public interest to introduce measures guaranteeing that employment contracts are respected and employees may not leave whenever it pleases them. This is particularly important in the world of football, where each player has a special position in the team and a club can only be run successfully if the manager has the opportunity to work with a set team over a certain length of time. Also, it is important for clubs to be able to plan their recruitment policy in order to make sensible additions to the team, taking into account eventual strengths or weaknesses in particular positions. Considering this, it cannot be denied that an absolute prohibition on football players from breaching their contracts is probably the most suitable method to ensure that contractual responsibilities are respected and

¹⁸⁰ The issue of re-distribution measures as a means to ensure sporting balance will be examined more closely below under point 5.1.1.1.

clubs know exactly how long a particular player will be available to play for the team.

However, although a certain stability of employment contracts is undeniably a basic requirement in any economy, it is doubtful whether a strict refusal to grant a player the possibility unilaterally to terminate his contract before its expiry does not go beyond what is necessary to ensure the clubs' interest in retaining their players. Not only in football, but in any business, a company needs to build a team of workers and the security that employees cannot quit at any time. In an ordinary working environment, though, it would be considered unacceptable if employees were under no circumstances allowed unilaterally to terminate their contracts and take up a more lucrative offer. Even a manager at top level, a highly skilled position that can be crucial for a company's success, cannot be bound by his contract infinitely. Moreover, football managers, which arguably are more significant for a club's success than a single player, are able to breach their contracts and move to another club, albeit the old employer will be eligible for compensation. Thus, although a club's interest in hindering a player from moving on to another engagement at any given time is undoubtedly justified, to refuse a player any opportunity to terminate a contract prematurely goes too far, particularly when the burden put on players by such a system is considered.

Long-term contracts without the option of unilateral termination put players at a disadvantage in many ways. To start with, in many cases players would after a few years only receive a fraction of the salary they could have earned if they had had the possibility to offer their services on the open market: especially players who had signed long-term contracts at a young age and on low wages, and did not have the chance to have their earnings adjusted according to their rising market value, unless they could move to another club prepared to pay a substantial transfer fee first. However, not only financial considerations, but also sporting concerns can trigger a player's desire to switch clubs. Taking into account that a player who does not have the chance to play first team football will automatically experience a decrease in market value, the necessity for a player regularly to take part in competitive matches becomes obvious. Thus, a player that had fallen out of favour with his manager and lost his place in the team would have desperately tried to engineer a move to a club

promising him a chance of first team football. Apart from sporting and financial considerations, it has to be considered that a long-term commitment to a particular club will also have a major impact on a player's personal life with respect to his choice of residence or way of living. Keeping in mind that many managers nowadays control their players' eating and social habits, the fact that a footballer could not move to another club acquires an even different dimension. Moreover, it is important to point out that the professional career of an average football player lasts between fifteen to twenty years at most. Consequently, a player that committed himself to a club for six years (a time span which was by no means a rarity after *Bosman*), would have been bound for a third of his total career, which undoubtedly intensified the restrictions put on players.

There have been claims, though, that long-term contracts did not constitute a disproportionate obstacle to the free movement, as footballers in principle had the opportunity to move, provided another club paid the requested transfer fee. Apart from the fact that this still left a player dependent on the consent of his club, even if the current club agreed to a transfer, at top level the transfer fees were often set at enormous amounts which few suitably wealthy clubs in Europe were able to afford. This had the additional effect that top-class players who wanted to leave their clubs did not have a real choice as to which club they moved to, but were restricted to negotiate with the few clubs that did have the means to pay the requested fee. A similar problem could be experienced in countries such as Spain, where transfer fees would not be negotiated between the clubs, but were determined by a minimum release clause included in a player's contract. Although in this particular scenario the player could leave without the agreement of his club as soon as another club was willing to pay the set fee, in most cases the situation for the particular player was by no means different, as transfer fees would often be set at an unrealistically high level. However, it has to be taken into account that players would also profit from having the security of a long-term contract. The 1997 Regulations did not only prohibit a player from moving without the consent of his current club, but also provided that a club could not simply terminate a player's contract. Hence, a player with deteriorating form or a chronic injury would have a guaranteed income until the end of his contract.

Although long-term contracts may also have advantages for the players, the downside of being bound by a contract with no chance of premature termination undoubtedly weighs heavier. Taking into account all the circumstances, it emerges that the 1997 FIFA regulations were indeed disproportionate, as the interest of the clubs to keep their players and be able to plan their employment policy could not outweigh the burden imposed on the players. Moreover, the clubs' interest could have been secured by the less restrictive measure of putting an obligation on players to compensate clubs for the loss incurred through a breach of contract. Hence, although contractual stability is undoubtedly essential in football, it is the fact that the FIFA transfer rules did not even allow players who had already fulfilled several years of their contracts to transfer to another club that brings the 1997 Regulations under the scope of the provisions on the free movement.

It is necessary to emphasise, though, that this does not mean that footballers should be allowed to leave their clubs at any time. On the contrary, contracts should have to be honoured for a certain period of time, but the longer the employment relationship lasts, the club's interest in contractual stability will be less and less justified. The main difficulty hereby is to determine exactly the point in time when the player's right to free movement takes precedence over the club's concerns and he should be allowed to leave.

Finally, it should be mentioned that the rationale behind long-term engagements of particular players only partially reflected the clubs' interest in the stability of contracts. The fact that clubs only started to sign players on a long-term basis after the Court's decision in *Bosman*, shows clearly that the practice was used in order to circumvent the effects of the decision¹⁸¹. In such cases where clubs would extend a player's contract for another four or five years, just to sell him a few weeks later for a substantial transfer fee, long term contracts were simply used as a means to compensate the clubs for the loss of income from transfer fees for out-of-contract players. This system of teams buying out the remainder of players' contracts was considered a legitimate way to regulate the movement of players after *Bosman* had

¹⁸¹ See also Caiger, A. & O'Leary, J., "The End of the Affair: The Anelka Doctrine – The Problem of Contract Stability in English Professional Football" in Caiger, A. & Gardiner, S. (eds.), *Professional Sport in the EU: Regulation and Re-regulation* (T.M.C. Asser Press, The Hague, 2000), p. 204; Weatherill, S, *op. cit. supra note 162*, p. 1028.

forced a change to the old system, whilst ensuring that clubs could still receive substantial transfer fees. Thus, even under the altered transfer rules footballers were not able to move freely and it could be argued that the new practice of binding players on a long-term basis constituted a blatant circumvention of *Bosman*, which infringed Community law. In the majority of cases, such contracts were concluded with the single purpose of receiving a transfer fee and the number of players that actually left “on a Bosman” was negligible in comparison to mid-contract transfers¹⁸². However, it is striking that many legal scholars at the time seemed to agree with this system and did not detect any discrepancies with Community law¹⁸³.

4.1.2. Exemption under Article 39(3)?

Having established that the 1997 transfer rules infringed Article 39(1), one may wonder whether they would have been open to an exception under Article 39(3) of the Treaty. However, taking into account that Article 39(3) was originally addressed to measures adopted by the Member States, the question whether private parties such as the international football associations should be able to invoke the justifications under Article 39(3) has been a matter of discussion ever since the direct horizontal effect of the provisions on free movement was confirmed.

In *Bosman*, the Court held that “there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health”¹⁸⁴. Even though the Court has acknowledged that the grounds of justification under Article 39(3) are available to private parties, it is questionable whether this grants sports bodies a suitable instrument to defend their internal rules. For example, one may wonder to what extent private organisations may actually invoke public

¹⁸² In this context see Caiger, A. & O’Leary, J., “Towards a Paradigm Shift in Professional Football: The Changing Contours of Business Relationships in English Football”, (1999) 7(2) SLJ, p. 48, citing a Chief Executive of a Premiership club: “We now negotiate much longer contracts 5 years plus. We try to get as many players as possible on 5 years. We used to have 2/3 year contracts – but if we pay more than £ 200 K for a player we insist on a minimum of four years. The economics don’t work on short-term contracts. [...] If players do not sign a new contract within 18 months of the expiry of their own contract we will sell them. We have longer contracts to preserve transfer fees”.

¹⁸³ See for example Arens, W., *op. cit. supra note 137*, p. 40; Gebhardt, D. *Modelle für die Reform des Transfersystems für Berufsfußballspieler aus rechtlicher und tatsächlicher Sicht* (Peter Lang Verlag, Frankfurt a.M., 2000), p. 86; Hilf, M. & Pache, E., *op. cit. supra note 153*, p. 1175; Grisenthwaite, M., *op. cit.*, p. 204.

¹⁸⁴ *Bosman*, at para 86.

interest considerations¹⁸⁵. In contrast to public authorities, which serve the public interest, private associations are founded in order to pursue the private interests of a group of individuals. Thus, it is unclear to what extent restrictive rules by private parties have to follow the public interest or whether they may be justified by the private interest of the group of individuals they represent. To take sports bodies as an example, it is widely acknowledged that professional sport has special cultural and social characteristics, the preservation of which lie in the public interest. Thus, as long as sporting rules are implemented to secure these special sporting features, they should be in the public interest.

On the other hand, it is imaginable that sports bodies may adopt rules that serve sporting interests, but are not necessarily covered by the public interest. Thus, it is questionable whether such measures would be eligible for justification under Article 39(3). In this context, it has been suggested that, following the direct horizontal effect of the provisions on free movement, the grounds for justification under Article 39(3) ought to be widened to accommodate legitimate private interests. In particular, it has been called for that the basic right of association shall be taken into account¹⁸⁶. Accordingly, associations should be able to defend internal rules which serve their common interest and may invoke the right to give themselves an internal structure and to regulate their own affairs.

Lacking conclusive case law on the matter, it is unclear how far the Court is prepared to go in accepting private interests as a reason for justification under Article 39(3). Having said that, provided a private restriction is covered by the freedom of association, it could always be argued that the undisturbed exercise of the basic right of association as such is in the public interest. On the other hand, considering the fact that the Court has been reluctant so far to pay attention to the basic right of association, it is doubtful whether measures of a private organisation would be excepted under Article 39(3), if they do not have at least some sort of

¹⁸⁵ Zuleeg, M., "Der Sport im Europäischen Gemeinschaftsrecht", in Will, M. (ed), *Sportrecht in Europa*, (C.F. Müller Juristischer Verlag GmbH, Heidelberg, 1993); see also Weatherill, S., "European Football Law", *op. cit. supra note 13*, p. 353, who points out that there was some risk that allowing private parties to invoke notions of public interest, security and health may cause their over-stretching.

¹⁸⁶ See Streinz, R. in Tettinger, P. (ed.), *Sport im Schnittpunkt von europäischem Gemeinschaftsrecht und nationalem Recht*, (Richard Boorberg Verlag, Stuttgart, 2001), p. 47; Streinz, R. & Leible, S., *op. cit. supra note 5*, p. 463.

public interest background apart from the fact that they pursue the particular association's objectives.

4.1.2.1. The 1997 Regulations under Article 39(3)

Analysing relevant case law, it is evident that the Court has introduced the justification test in *Bosman* as a “rule of reason” in analogy with *Cassis de Dijon*, rather than an extension of the scope of Article 39(3). Consequently, a provision that does not pass the “rule of reason” test could theoretically still be justified on grounds of public policy, public security or public health.

However, considering that the first test involves an examination as to whether the measure is justified by pressing reasons of public interests, followed by proportionality considerations, it is highly unlikely that an indistinctly applicable rule which does not meet the conditions of the initial test, will then be justified under Article 39(3). The case of the 1997 FIFA transfer rules is no different and despite the fact that Article 12(4) might well have been justified under public policy considerations, it would again have failed the proportionality test.

4.1.3. Freedom of Association

It has already been established above that sports associations are protected by the basic right of freedom of association¹⁸⁷. This human right may only be limited by Community law if it is necessary for the protection of the rights and freedoms of others and as long as the restriction does not go any further than is necessary to address the legitimate aim pursued. As part of their freedom of association, sports bodies such as FIFA are entitled to establish rules to protect the concerns of the particular sport. Hence, a provision that prohibits the unilateral termination of a footballer's contract might be covered by FIFA's right to freedom of association, as long as it is necessary in the interest of the sport of football.

The 1997 Regulations have been put into place in order to ensure a stability of contracts, to establish a sporting balance between clubs and to encourage the recruitment of young players, all goals which pursue a sporting interest in so far as they shall guarantee the proper functioning of sporting competition. As such they are

¹⁸⁷ See point 1.3.3.3 above.

covered by the basic right of freedom of association. Leaving aside the question whether the 1997 Regulations were indeed suitable to achieve these aims, which has been discussed above¹⁸⁸, according to Article 11(2) of the ECHR, FIFA's regulatory power may still be limited by Community law if such a limitation is necessary to protect the workers' right to free movement and satisfies the proportionality test. A correct evaluation of the basic right of association requires a balancing of the conflicting interests, i.e. the football associations' interest in regulating their sport against the players' right to free movement. However, if the "rule of reason" test is applied as proposed above¹⁸⁹, it already takes account of the sports' associations right to self-regulation as it allows sports bodies to adopt measures following a sporting interest. The fact that the "rule of reason" provides for a proportionality test does not prevent a proper adherence to the right of association. If the sporting interest could be ensured by less restrictive measures, the required balancing approach will generally have the effect that the interest of the athlete in free movement prevails. Hence, considering that, as has been demonstrated above, a less restrictive regime would have been available to ensure contract stability, the football governing bodies' right of association may not prevent the application of the provisions on free movement in this respect.

4.2. INDIVIDUAL CONTRACTS – PACTA SUNT SERVANDA?

Usually, transfer restrictions are imposed by measures of sporting bodies regulating the movement of players in a collective manner. However, assuming that there were no transfer regulations in place, does this mean that players could be bound by employment contracts indefinitely? In other words: could a player, who has committed himself to a, say, seven year contract, rely on Article 39 to escape his contractual obligation? In general, the Member States' labour legislation prevents employees from being bound by employment contracts for an excessive period of time; still, as a matter of interest, it is worthwhile to examine the issue from a

¹⁸⁸ See point 4.1.1.1 above.

¹⁸⁹ See point 3.2.3.2 above.

Community law perspective, assuming there are national labour laws allowing irrevocable long-term employment contracts. Moreover, such considerations could be relevant in connection with individual release clauses, providing that a certain player may only transfer to another club if such club pays a particular transfer fee.

Whereas the Court applied Article 39 to rules by private parties, regulating working conditions collectively, as early as the seventies, the question whether the provisions on the free movement of persons also extend to individual contracts between private parties has been highly disputed. However, in its decision in *Angonese*, the European Court of Justice confirmed, “the prohibition on grounds of nationality laid down in Article 48 [now 39] of the Treaty must be regarded as applying to private persons”¹⁹⁰. Thus, Article 39 not only applies to collective rules regulating player movement, but may also concern individual contracts between clubs and players. Having said that, it is unclear whether the application of Article 39 to individual contracts relates exclusively to discriminatory clauses¹⁹¹, or whether indistinctly applicable rules hindering an EU national from taking up employment in another Member State are also covered. Evidently, only if the latter is the case, could the proposed scenario theoretically come under the scope of Article 39(1) of the Treaty.

It has already been identified in what sense long-term contracts restrict a player’s right to free movement. However, since players, with the help of their agents, are able to negotiate the terms of their contracts, it is arguable that it is the player’s own decision whether he agrees to stay with a club for seven years and should consequently be bound by it. Looking at the concept of Article 39 of the Treaty, it is not clear whether it is in fact possible for a worker contractually to waive his right to free movement. If Article 39 is understood as a tool of internal market policy that requires the removal of any obstacles to free movement within the Community, the right to free movement is not at the disposal of the individual worker. However, the functioning of the common market is already ensured by the competition rules, which shall prevent a distortion of competition and do only give limited rights to private parties. In contrast, Article 39 was originally intended to give

¹⁹⁰ *Angonese*, at para 36.

¹⁹¹ In this sense see Randelzhofer, A. in Grabitz, E. & Hilf, M., *Das Recht der Europäischen Union* (C.H. Beck, München, 2003), p. 47.

each individual EU citizen the right to take up work in another Member State and to provide him with a remedy to appeal against discriminating measures by the host Member State. Although this concept has been extended by the Court to indistinctly applicable measures and agreements between private parties, the freedom of movement still remains an individual right guaranteed to the worker. Consequently, the protection by the right to free movement can in principle be waived by concluding an employment contract committing a person to a particular company for a limited period of time¹⁹².

However, where a worker enters into an agreement with a party, having an unfair advantage in negotiation power, the protection of Article 39 should not be withdrawn. An 18-year-old player desperate for the chance to play for a major club, for example, will usually have no choice but to accept the terms of contract dictated by the club, even if he has to commit himself for six or seven years on a low wage. Of course it could be argued that the club offering an undeveloped young prospect a chance is also taking a risk that may not pay off, but this cannot detract from the fact that the player is put under a disproportionate restriction. In contrast, a top-class player earning ten thousands of pounds a week has the possibility to choose which club he wants to play for and will be able to negotiate the best deal possible. Such a player does not need protection under Article 39 of the Treaty and once he concludes an agreement with a club, should be bound by it. The same applies in those scenarios where player and club agree on a minimum release clause, which is then introduced in the employment contract. Where a player has equal negotiation power, he is in a position to dictate the maximum transfer sum fixed in his contract. If a buy-out clause features a transfer fee that is absolutely unrealistic in respect of the market value of a player, though, it may be suspected that the player was pressured into the agreement and therefore should be protected by EC law.

4.2.1. Justification under Article 39(3)?

Having identified the difficulties private associations are faced with when trying to rely on the grounds for justification set out in Article 39(3), it is evident that it will

¹⁹² See also Klingmüller, "Die Zulässigkeit von Ablösesummen für vertraglich gebundene Profifußballspieler", (2001) 1 SpuRt, p. 4.

be even harder for a single employer to invoke public interest considerations to defend his measures. In this sense, it has been argued that the use of the exceptions under Article 39(3) should be restricted to private parties such as FIFA, which have been granted powers of self-regulation as a result of delegation by public authorities and regulate the conditions of employment in a collective manner within a particular sector¹⁹³. However, once rules by single employers are considered to fall within the scope of Article 39(1), it is only fair that the derogations under Article 39(3) should be open to them. Having said that, it is difficult to imagine a scenario whereby it could be successfully argued that a restrictive measure by an individual employer was justified on grounds of public policy, public security or public health.

For example, the Basque club Athletic Bilbao has for political and historical reasons adopted a policy of exclusively employing native Basque players. At first sight, this scenario is reminiscent of the situation in *Angonese*, where a private employer introduced a language requirement, which effectively favoured workers from a certain region. Thus, it seems impossible to provide a valid legal argument that explains why such a blatant case of nationality discrimination should be justified with regard to the public interest. However, unlike in the case of any ordinary company, Bilbao's fans identify themselves with their club and would be devastated if its recruitment policy changed. That this situation has to be differentiated from cases like *Angonese* is also underlined by the fact that for Bilbao, which restrain themselves to a very small pool of possible employees, this actually means an economic and sporting disadvantage in respect to other clubs. This illustrates that such recruitment decisions are solely based on cultural and historical, rather than economic considerations, which should be acknowledged. Other examples are imaginable: What if a club announces that it will exclusively take on domestic players to strengthen the development of the national team? As such a practice is undoubtedly discriminatory and therefore may not escape the application of Article 39(1) under the *Bosman* "rule of reason", one may wonder whether such special sporting interests may be accommodated under Article 39(3). Considering the wording of Article 39(3), it seems unlikely that such discriminatory measures could

¹⁹³ See Fernandez Martin, "Re-defining Obstacles to the Free Movement of Workers", (1996) 21(4) ELRev, p. 325; Kranz, A., *op. cit. supra note 133*, p. 450.

be justified under the public interest. Having said that, it seems unsatisfactory that clubs should not be able to follow a certain recruitment policy in the sporting interest or for cultural reasons. Also, it is submitted that in contrast to other private parties like FIFA, which regulate sporting activity in a collective manner, private employers should be able to enjoy a wider discretion when it comes to the implementation of such restrictive practices. In any case, although it has to be welcomed that the public interest exceptions under Article 39(3) are now available to private employers, one may wonder whether they in fact sufficiently reflect the interests of the parties concerned.

Returning to the case at hand, it suffices to refer to the explanations put forward under point 4.1.2 above, stating that the burden put on players by transfer regulations not allowing the unilateral termination of long-term contracts is excessive. The same rationale applies to the scenario whereby no transfer regulations exist and players were forced into such contracts, which means the restriction imposed thereby may not be justified under Article 39(3) of the Treaty.

5. EC COMPETITION LAW

When assessing the application of Community law to sport, it becomes evident that sporting rules not only fall within the scope of the provisions on free movement, but may also be caught by the prohibitions set out in Articles 81(1) and 82 of the Treaty. However, whereas it is settled case law that measures established by sports bodies are subject to the application of Article 39, the Court has repeatedly passed on the chance to assess sporting rules under the provisions on competition law¹. In *Bosman*, for example, the Court took the view that it was unnecessary to consider Articles 81 and 82 of the Treaty, since the sporting rules in question had already been held as infringing the right to free movement². Similarly, it refused to address the issue of competition law in *Deliège* and *Lehtonen*, claiming that the national court in question had not provided sufficient information to enable the Court to define the relevant markets³. Hence, when examining the application of EC competition law to sport, official guidance can merely be deducted from Commission documents or statements of Community officials, rather than case law. In this sense, one can only hope that sooner rather than later the Court will have the opportunity to define its approach to sporting matters under Articles 81 and 82 of the Treaty, removing the existing legal uncertainty in the area⁴.

¹ The only time where a sports case exclusively relating to a question of competition law rather than free movement reached the Court, the parties settled out of court and the case was removed from the register after the Advocate-General had delivered her opinion. It is interesting to note that the opinion was available on the EU website for a short period of time and was removed without being officially reported, see Case C-264/98 *Tibor Balog v Royal Charleroi Sporting Club ASBL*, removed from the register, opinion of AG Stix-Hackl, delivered on 29 March 2001.

² Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v. Bosman and Others* [1995] ECR I-4921, at para 138.

³ Cases C-51/96 & 191/97 *Christelle Deliège v. Ligue Francophone de Judo et Disciplines Associées ASBL* [2000] ECR I-2549, at para 36 and Case C-176/96 *Jyri Lehtonen v. Fédération Royale Belge des Sociétés de Basketball ASBL* [2000] ECR I-2681, at para 28.

⁴ It has already been mentioned that the Court of First Instance has tackled the issue of sporting rules under EC competition law in Case T-313/02 *Meca-Medina & Majcen v. Commission* [2004] 3 CMLR 60; since Mr. Meca-Medina and Mr. Majcen have appealed against the judgment (see OJ 2005 C 57/16), the Court will most likely address the competition law issue this time, and as expressed by Weatherill, "it is to be hoped that it [the appeal] will be used as a springboard to a clearer analysis of the limits of EC law and, in particular, that the CFI's disdain for orthodox competition law analysis as a means to deal with sporting practices will be set aside", see Weatherill, S., "Anti-Doping Rules and EC Law", (2005) 26(7) ECLR, p. 416.

5.1. THE APPLICATION OF COMPETITION LAW TO SPORT

The competition rules generally apply to all sectors of economy except where the Treaty itself provides otherwise⁵. Despite the fact that professional sport undoubtedly constitutes an economic activity, it has to be differentiated from other industries in so far as it is of great social and cultural significance in European society. Having said that, the social characteristics of sport cannot override the fact that professional sport is a major player in the European economy and as such should not be automatically exempted from the application of Articles 81 and 82 of the Treaty⁶.

In reaction to demands by scholars and the European Parliament, the Commission has repeatedly acknowledged the need to protect the social and cultural benefits of sport and has shown willingness to take into account the particular characteristics of sport when assessing sporting rules under EC competition law⁷. Although the motives for granting sport a special status in competition law are certainly laudable, the Commission has so far struggled to provide a convincing legal base for such privileged treatment. However, as will be demonstrated below, the decision in *Wouters*⁸ gives reason to believe that the Court has moved away from a strictly market-orientated approach and will be more willing in future to take into account non-economic considerations when assessing a restrictive agreement under EC competition law.

⁵ As it does, for example, for: agriculture, Articles 36 and 37 of the EC Treaty; national security, Article 296; and in the past, coal and steel, see Article 305(1), establishing that provisions of the EC Treaty shall not affect provisions of the ECSC Treaty, which had its own competition rules (Articles 65 and 66).

⁶ See Commission press release IP/99/133, "Commission debates application of its competition rules to sport", 24.2.1999; EP Resolution on the role of the European Union in the field of sport, A4-0197/97, OJ C 200/252, 30.6.1997, point J; Schellhaaß H. & Enderle, G., "Sportlicher versus ökonomischer Wettbewerb", Arbeitspapiere des Instituts für Rundfunkökonomie und der Universität zu Köln, Issue No. 95/98, June 1998, p.11; Speech Schaub, A., "EC Competition Policy and its Implications for the Sports Sector", World Sports Forum, St Moritz, 8.3.1998.

⁷ See Commission press release IP/99/918, "Helsinki Report on Sport: The Commission favours a new approach", 12.1.1999; Commission press release IP/99/133, *op. cit.*; Speech Pons, J.-F., "Sport and European Competition Law", Fordham Corporate Law Institute, Twenty-sixth Annual Conference on International Antitrust Law & Policy (1999), p.6.

⁸ Case C-309/99 *Wouters v. Algemene Raad van de Nederlandse Orde van Avocaten* [2002] ECR I-1577.

5.1.1. The “Peculiar Economics” of Professional Team Sports

Apart from the social dimension of sport, sports organisations have always claimed that the special economic structure of professional team sports warrants an exemption from the application of the competition rules. Thus, the question whether the sports industry has characteristics different from other markets has been the subject of animated debates between economists around the globe since the 1950s⁹. Unlike the textbook firm in economic theory, operating independently from other competitors with the ultimate goal to drive rival firms out of the market in order to acquire monopoly status, a sports team depends on its competitors and has a vital interest in their survival. No club is able to produce a valuable good on its own, which means that without co-operation between the clubs in a league there is no competition at all: sporting competition needs a certain degree of organisation, which requires the competitors in a league to establish basic rules for the operation of the league, such as a fixture list.

5.1.1.1. The Uncertainty of Outcome Hypothesis

Apart from organisational matters, the most “peculiar” phenomenon in professional team sports, enhancing the need for co-operation, is described by the “uncertainty of outcome” hypothesis, according to which spectators prefer closer to less balanced contests. Thus, it is argued that the domination of a single club or a few big teams would reduce the overall consumer interest in the sport, thereby negatively affecting the dominant team(s) in the long run. It is the acceptance of this concept that has led sports regulatory bodies to introduce anti-competitive practices such as re-distribution mechanisms or restrictions on the labour market, in order to ensure a sporting balance between the clubs and prevent a few dominant teams from gaining too much market power. However, despite the fact the “uncertainty of outcome” hypothesis is almost universally accepted by economists¹⁰, there have been concerns

⁹ See for example Rottenberg, S., “The Baseball Players’ Labour Market” (1956) 64 *Journal of Political Economy*, pp. 242 – 258; Neale, W., “The Peculiar Economics of Professional Sports” (1964) 78 *Quarterly Journal of Economics*, pp. 1 – 14.

¹⁰ See for example Quirk J. & Fort R., *Pay Dirt: The Business of Professional Team Sports* (2nd edn, Princeton University Press, Princeton, 1997), p. 243; Morrow, S., *The new Business of Football*–

over the lack of conclusive empirical evidence to support the concept¹¹. Furthermore, the theory has been criticised as an “overworked hypothesis in explaining the demand for professional team sports”¹², in so far as there has been evidence of long-run domination in sports, which has developed into a traditionally acceptable form of competition. This has been the case in Scottish football where the importance of competition and sporting balance is less prominent owing to the historical dominance of the so-called “Old Firm”, Celtic and Rangers¹³.

Although there might be doubts as regards the uncertainty of outcome hypothesis, in most professional team sports the governing bodies have accepted the need to ensure a sporting equilibrium and introduced measures to achieve a certain sporting and financial balance between clubs. Evidently, the role of such bodies like the football associations in managing the collective interests of all clubs is in direct conflict with the interests of the most successful clubs, which pursue the objective of maximising their individual profit and which, without restrictions, would be more profitable. A typical example for this conflict of interests is the collective selling of football broadcasting rights: this practice works in favour of smaller clubs in a league, receiving a bigger share of television revenues in comparison to a situation where broadcasting rights are sold individually. However, the joint selling of broadcasting rights is usually objected to by the bigger clubs, which could be

Accountability and Finance in Football, (Macmillan Press Ltd, London, 1999), p. 8; Haan, M., Koning, R. & van Witteloostuijn, A., “Market Forces in European Soccer”, University of Groningen Research Institute, Research Report No 02F18 (2002), available at www.ub.rug.nl/eldoc/som/f/02F18.pdf, p. 2; see also AG Lenz in *Bosman*, at para 227, where the AG stressed the special economics of the football market: “Football is played by two teams meeting each other and testing their strength against each other. Each club thus needs the other one in order to be successful. For that reason each club has an interest in the health of the other clubs. The clubs in a professional league thus do not have the aim of excluding their competitors from the market. Therein lies [...] a significant difference from the competitive relationship between undertakings in other markets. It is likewise correct that the economic success of a league depends not least on the existence of a certain balance between its clubs. If the league is dominated by one overmighty club, experience shows that lack of interest will spread”.

¹¹ See Cairns J., Jenet, N. & Sloane, P., “The Economics of Professional Team Sports: A Survey of Theory and Evidence”, (1986) 13 *Journal of Economic Studies*, p. 5; see also Gratton, C., “The Peculiar Economics of English Football” in Garland, J., Malcolm D. & Rowe M. (eds), *The Future of Football: Challenges for the Twenty-First Century* (Frank Cass Publishers, London, 2000), p. 28.

¹² So Downward, P. & Dawson, A., *The Economics of Professional Team Sports* (Routledge, London, New York, 2000), p. 149.

¹³ For further expertise on the Scottish dimension, see Morrow, S., *op. cit. supra note 10*, pp. 25 – 27, who points out that “Scottish football finds itself in a very unusual position whereby the financial and footballing success of these two clubs [Celtic and Rangers] seems to invalidate conventional economic theory on sporting competition”.

generating a lot more income if they were allowed to market the rights to their games individually and did not have to support the weaker teams.

When examining the practices with which sporting authorities are trying to establish a sporting equilibrium, it is possible to detect differences not only between certain sports, but also in respect of team sports on either side of the Atlantic. Whereas in US professional team sports player drafts, wage caps and gate revenue sharing are the most commonly used mechanisms, in Europe the collective marketing of broadcasting rights and transfer systems are the preferred methods to ensure an uncertainty of results. All of these measures have been critically analysed by economists as regards their suitability to achieve competitive balance and league quality. However, the majority of the research produced has handed a blow to the sports bodies' arguments that certain restrictive practices are necessary tools to keep a sporting balance in the league. It has been established, for example, that the introduction of free agency in American baseball and basketball did not have a negative impact on the competitive balance in those leagues¹⁴. Similarly, the football transfer system at issue in the *Bosman* case was widely considered a rather ineffective mechanism for achieving competitive balance¹⁵.

In this context, Advocate-General Lenz argued that less restrictive means, in particular re-distribution measures, were available to the footballing bodies in order to ensure an uncertainty of results¹⁶. However, there is disagreement amongst economists as to whether revenue sharing does in fact achieve competitive balance¹⁷, or whether it actually reduces it¹⁸. The reason behind this difference of opinion lies in

¹⁴ See Quirk J. & Fort, R., *op. cit. supra note 10*, p. 293; in favour of a system of free agency see also Ross, S., "Restraints on Player Competition that Facilitate Competitive Balance and Player Development and their Legality in the United States and in Europe" in Jeanrenaud, C. & Késenne, S. (eds), *Competition in European Sports after the Bosman Case: Competition Policy in Professional Sports* (Standaard, Antwerp, 1999), p. 96.

¹⁵ See Késenne S., "Player Market Regulation and Competitive Balance in a Win Maximizing Scenario" in Jeanrenaud C. & Késenne S. (eds), *op.cit. supra note 14*, p. 129; Ross, S. *op. cit. supra note 14*, p. 100.

¹⁶ AG Lenz in *Bosman*, at para 270.

¹⁷ See Késenne, S., "Revenue Sharing and Competitive Balance in Professional Team Sports", (2000) 1(1) *Journal of Sports Economics*, pp. 56 – 65; Schellhaaß & Enderle, *op. cit. supra note 6*, p.7.

¹⁸ See Feess, E. & Stähler, F., "Revenue Sharing in Professional Sports Leagues" (2002), p. 1, available at http://gemini.econ.umd.edu/cgi-bin/conference/download.cgi?db_name=IIPF59&paper_id=87; see also Lewis, A., Bell, A., Chilvers, C. et al. (eds.), *Sport: Law and Practice* (Butterworths, London, 2002), where it is pointed out that a re-distribution system that takes away too much money from the big clubs destroys the incentive to succeed.

the fact that most economic models of professional team sports are based on the hypothesis that clubs are profit maximisers¹⁹, implying that the ultimate goal of the team or respectively its owner(s) is to make as much money as possible. Whereas this generally applies to the highly commercialised American market, economists have questioned the relevance of the profit maximisation assumption for European professional team sports²⁰. Thus, it has been argued that European clubs are in fact win-maximisers, as they are not purely profit-orientated, but their main object is to produce playing success²¹. Hence, whether football authorities should be allowed to use revenue sharing mechanisms under EC competition law ultimately depends on the question whether football is in fact an industry different to other markets in the sense that football clubs, unlike other firms, rate sporting success higher than financial profit. The conflict over revenue sharing practices makes clear that, when examining measures imposed as a means to ensure a certain uncertainty of outcome, a thorough economic analysis is needed to establish whether the adopted restraints are suitable to protect the league's interest in a competitive balance effectively.

5.1.1.2. Teams Sports – A Natural Monopoly

Professional sports leagues not only differ from other markets owing to the requirement of an uncertainty of outcome, but also in so far as they constitute what is commonly referred to as a “natural” monopoly. A natural monopoly presupposes a market with substantial barriers to entry where a single seller is supplying the entire market with a unique product and leaves the customer without the possibility of substitution²². The market for football satisfies these criteria: Firstly, professional football in Europe is exclusively organised by FIFA or associations belonging to

¹⁹ See for example, Neale, W., *op. cit. supra note 9*, pp. 1 – 14; also Feess, E. & Stähler, F., *op. cit. supra note 18*, who dismiss the notion that anything can stop clubs from becoming ordinary firms as being “naïve”, p. 10.

²⁰ See Késenne, S. in Jeanrenaud, C. & Késenne S. (eds), *op. cit. supra note 14*, p. 117; Sloane, P., “The Economics of Professional Football: the Football Club as a Utility Maximiser” (1971) 2(17) *Scottish Journal of Political Economy*, pp. 121 – 146; Foster, K., “Can Sport be Regulated by Europe?: An Analysis of Alternative Models”, in Caiger, A. & Gardiner, S. (eds), *Professional Sport in the EU: Regulation and Re-regulation*, (T.M.C. Asser Press, The Hague, Netherlands, 2000), p. 57.

²¹ It remains to be seen whether Malcolm Glazier's take-over of Manchester United marks the start of US conditions being introduced in European team sports, i.e. a shift from a win-orientated club management to a predominantly profit-orientated management to return the owners' investments.

²² See Foster, K., “How Can Sport be Regulated” in Greenfield, S. & Osborn, G. (eds), *Law and Sport in Contemporary Society* (Frank Cass, London, 2000), p. 270.

FIFA. Secondly, for a real fan, there are no substitutes for football. Most supporters would not even switch allegiances from one club to another, let alone watch rugby or cricket because of an advance in ticket prices. Although there may be consumers who would be happy to watch another sport instead if the price for receiving coverage of football games increased, the only available alternative for the majority of football fans would be to give up sport altogether. Finally, a single league can deliver the product (the sport in question) at a lower cost than a multiplicity of leagues, with the result that generally there is only one league per sport per nation²³. Furthermore, considering the enormous expense involved in the organisation of team sports, it emerges that it is virtually impossible to establish a rival football league.

It has been submitted that the rules on competition apply to free markets only and therefore alternative forms of regulation are needed on markets with a natural monopoly²⁴. However, the fact that the football industry qualifies as a natural monopoly means that consumers in fact require even more protection by competition law, as the failure of the normal market mechanisms give the football associations and the clubs an opportunity to abuse their market power. This has been illustrated, for example, by cases of price fixing for replica football kits in England, whereby ten businesses, including the English FA and Manchester United, have been fined a total of £ 18.6 million by the Office of Fair Trading²⁵.

5.1.2. EC Competition Law – Room for a Sporting Exception?

Despite the fact the Commission has explicitly recognised the peculiar economics of sport, as well as its social significance, it nevertheless rejected the idea of a total exemption of the sport sector from the application of competition law²⁶. Considering

²³ See Downward, P. & Dawson, A., *op. cit. supra note 12*, p. 21; this has been particularly evident in the US, where there have been repeated attempts to establish rival baseball leagues, all of which failed after a short period of time.

²⁴ See Foster, K. in Greenfield, S. & in Osborn, G. (eds), *op. cit. supra note 22*, p. 272, who states that “A natural monopoly is the antithesis of the free market. Regulation via competition law is inappropriate”.

²⁵ Decision of the OFT No. CA98/06/2003 from 1.8.2003, an appeal against the decision has been dismissed by the Competition Appeal Tribunal, see Coulter, A., “Anti-Competitive Agreements: Football Replica Kits – Price Fixing, ECLR (2005) 26(2), N32-33.

²⁶ See Speech Monti, M., “Competition and the Rules of the Game”, Conference on Governance in Sport, Brussels, 26.2.01, SPEECH/01/84; Speech Schaub, A., “Sports and Competition: Broadcasting Rights of Sports Events”, Jornada día de la competencia, Madrid, 26.2.02; Report

the substantial economic potential of the sports industry, it would definitely go too far to remove the whole sector from the scope of competition law and one has to agree with the statement of a Commission official, stressing that “a general exemption from the competition rules for the sports sector is unnecessary, undesirable and unjustified”²⁷. Still, there have been attempts to construe a “sporting exception” in EC competition law, argued to embrace rules which are of sporting interest only and measures necessary for the organisation of sport itself²⁸. It has already been established above that genuine “rules of the game” are not covered by the Treaty, since they do not affect economic activity. However, one should be wary of allowing exceptions to competition law in cases where sporting measures have an economic impact, even if it is only incidental. Those in favour of a sporting exception claim that rules necessary to ensure an uncertainty of results, distribution measures adopted to encourage the development of young players, selection rules for international tournaments, rules establishing fixed transfer periods²⁹ and anti-doping regulations do not fall within the scope of the Treaty³⁰. The sporting exception in EC competition law is said to be an “autonomous principle, which has its affinities with, but is independent of, the ‘rule of reason’”³¹.

The Commission has confirmed in the past that provisions inherent to a sport and/or necessary for its organisation do not fall within the scope of Articles 81 and 82 of the Treaty, provided they are applied in an objective, transparent and non-discriminatory manner³². However, the fact that the Commission has acknowledged that certain sporting measures may not come under the scope of Article 81 of the Treaty offers no conclusive proof that there exists such a thing as a sporting

from the Commission to the European Council with a view to safeguard current sports structures and maintaining the social function of sport within the Community framework (“The Helsinki Report on sport”), Brussels, 10.12.1999, COM (1999) 644 final, p. 8; Commission press release IP/99/133, *op. cit.*; Speech Van Miert, K., “Sport et concurrence: Développements récents et action de la Commission”, Forum Européen du Sport, Luxembourg, 27.11.97.

²⁷ Speech Schaub, A., World Sports Forum, St Moritz, *op. cit. supra note 26*.

²⁸ See Beloff, M., “The Sporting Exception in EC Competition Law” (1999) *European Current Law*, at xvi; Lewis, A., Bell, A., Chilvers, C. et al. (eds.), *op. cit. supra note 18*, at para B2.56.

²⁹ See Beloff, M., *op. cit. supra note 28*, at xvi.

³⁰ Lewis, A., Bell, A., Chilvers, C. et al. (eds.), *op. cit. supra note 18*, at paras B2.56 – B2.60.

³¹ Beloff, M., *op. cit. supra note 28*, at xvi.

³² See for example, Speech Monti, M., *op. cit. supra note 26*; Speech Schaub, A., Jornada dia de la competencia, Madrid, *op. cit. supra note 26*; Speech van Miert, K., *op. cit. supra note 26*; Speech Pons, J.-F., *op. cit. supra note 26*, p.6; Commission press release IP/99/133, *op. cit. supra note 26*; Helsinki Report on Sport, *op. cit. supra note 26*, p.8.

exception in EC competition law. Besides, the rationale behind an exception for rules without which a sport could not exist on one hand and a general exemption for rules purely motivated by sporting considerations on the other is fundamentally different. Whereas it will be demonstrated below that an exemption for rules vital for the existence of a sport is consistent with EC competition law, an exemption for rules adopted by sports bodies by reason of their sporting nature is not. Once a sporting measure has a restrictive effect on competition, it is principally caught by the Treaty and may only be justified according to the rules of competition law³³. It seems unsatisfactory, to say the least, that sporting measures which might have a considerable economic impact should be capable of being exempted from competition law without any further examination, simply because they were motivated by non-economic considerations. In this context, it should also be considered what repercussions for other industries it would have once the Pandora's Box of a sporting exception to EC competition law was opened, considering the number of businesses claiming to pursue purely social or cultural interests.

Moreover, as pointed out by the Commission, it is not always easy to identify the intrinsic sporting nature of certain rules, either because they might have significant economic consequences or because the rule, originally established for purely sporting reasons, has taken on more of an economic character as a result of the economic activities associated with the sport³⁴. The difficulties involved in the construction of an exception to provisions of the Treaty, based on the sporting nature of certain rules, have already been highlighted in connection with the articles on free movement. The concept of a sporting exception in EC competition law only confuses matters and also stands in contrast to the Court's decisions regarding free movement,

³³ See also the Court of Arbitration for Sport Case 98/200 *AEK Athens and Slavia Prague v. UEFA*, at paras E.114 - E.116, where the CAS held that rules regarding the prohibition of common ownership of football clubs in Europe did not fall within any "sporting exception", given their economic nature. In this context the Court pointed out that the scope of such an exception to EC competition law would have to be construed so narrowly that in practice no sporting rule would ever fall within such an exception.

³⁴ "Draft/Preliminary Guidelines on the Application of the Competition Rules to Sport", Competition Memorandum of 15.2.1999, unpublished, p. 29; see also speech Pons, J.-F., *op. cit. supra note 26*, p. 7.

where an exception for sporting rules by reason of their sporting nature cannot be identified either³⁵.

5.1.3. The “Rule of Reason” in EC Competition Law

Having established that there is no room for a sporting exception in EC competition law, one may wonder whether any sporting rule restricting competition necessarily infringes EC competition law. It is evident that if Article 81(1) was taken literally, almost all contractual arrangements containing restrictive clauses would come within the scope of the prohibition and, unless they were exempted under Article 81(3), would be void. In order to render the prohibition in Article 81(1) more flexible, there have been calls for the introduction of a “rule of reason” in EC competition law. The “rule of reason” doctrine has its origins in US antitrust law, which does not provide for a mechanism in the form of Article 81(3) of the Treaty. Hence, US courts have introduced a balancing approach, whereby the anti-competitive effects of an agreement that contains no *per se* restriction are weighed against its positive effects on competition. The question whether the “rule of reason” has a place in EC competition law has been a matter of discussion throughout the years. Thereby, many scholars have emphasised the differences between US and EC competition law, arguing that in order to prevent confusion, the use of the notion “rule of reason” should be avoided in an EC law context³⁶. Undoubtedly, the two systems are so different that the adoption of US terminology in Community law should be treated with the utmost caution. In EC competition law, an agreement between undertakings that restricts competition is generally caught under Article 81(1) with the consequence that, unless it satisfies the criteria for exemption set out in Article 81(3), it is void. Thus, unlike the so-called “rule of reason” approach in US antitrust law, the wording of Article 81(1) does not allow the balancing of anti- and pro-

³⁵ However, see the decision of the Court of First Instance in *Meca-Medina*. The stated exception for rules purely motivated by sporting considerations from the provisions on free movement, as well as competition law has already been criticised, see point 3.2.3.4 above. The judgment will be further examined under point 5.1.4.1.

³⁶ See for example Goyder, D., *EC Competition Law* (4th edn, Oxford University Press, Oxford, 2003), p. 117; Whish, R., *Competition Law* (5th edn., Lexis Nexis UK, London, 2003), p. 102; on the other hand see the opinion of AG Roemer in *Case 56/65 Société Technique Minière v. Maschinenbau Ulm* [1966] ECR 235, at p. 257, who suggested the use of the notion “rule of reason” in EC competition law.

competitive effects, as restrictive agreements can only be justified if they satisfy the conditions of Article 81(3). Moreover, in contrast to the US system, any agreement which falls under the prohibition of Article 81(1) may be exempted under Article 81(3) of the Treaty, even if it includes *per se* or (as the Commission refers to them) “hardcore” restraints on competition³⁷. If the pro- and anticompetitive effects of an agreement were already evaluated under Article 81(1) of the Treaty, Article 81(3) would be deprived of its function, amounting to a factual amendment of the Treaty, without following the necessary procedures³⁸. Consequently, the concept of a “rule of reason” as applied in US antitrust law cannot be adopted in EC competition law, as this would constitute a breach of the Treaty.

On the other hand, when analysing relevant case law of the Court of Justice, one can find several examples whereby the Court has considered agreements containing restrictions not to be caught by the prohibition in Article 81(1). The first in a series of such decisions was *Société Technique Minière v. Maschinenbau Ulm*, in which the Court established that agreements restricting competition were compatible with Article 81(1) of the Treaty, if, taking all the circumstances in the particular case into account, it was apparent that without those restrictions the competition to be protected would not be possible at all. In the particular case, which involved a clause in a distribution contract granting the distributor the exclusive right to supply a certain area, the Court held that the agreement did not fall foul Article 81(1), arguing that “it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking”³⁹. Taking into account the main rationale behind the

³⁷ See Case T-17/93 *Matra Hachette v. Commission* [1994] ECR II-595, at para 85, “no anti-competitive practice can exist which, whatever the extent of its effect on a given market, cannot be exempted”.

³⁸ See Manzini, P. “The European Rule of Reason – Crossing the Sea of Doubt”, (2002) 23(8) ECLR, p. 395; Schaub, A., Speech at the Fordham Corporate Law Institute New York, 25th Annual Conference: International Antitrust Law and Policy, “EC Competition System – Proposals for Reform”; “White paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty”, OJ 1999 C 132/1; see also Case T-112/99 *Métropole Télévision (M6) and Others v. Commission* [2001] ECR II-2459, at para 74 where the CFI submitted that “Article 85(3) [now 81(3)] of the Treaty would lose much of its effectiveness if such an examination [the weighing of pro- and anti-competitive aspects of a restriction] had to be carried out already under Article 85(1) [now 81(1)] of the Treaty”, confirmed in Case T-65/98 *Van den Bergh Foods Ltd v. Commission* [2003] ECR II-4653, at para 107.

³⁹ Case 56/65 *Case 56/65 Société Technique Minière v. Maschinenbau Ulm* [1966] ECR 235, at p. 250.

existence of competition law, the preservation of a competitive market, it seems logical that agreements without which the relevant trade would not take place at all, should not be caught by the prohibition in Article 81(1), despite their restrictive nature. Hence, the decision in *Société Technique Minière* did not involve a balancing of pro- against anticompetitive effects, but simply recognised that, owing to market imperfections, restrictive practices may be necessary for the existence of agreements that are in principle beneficial for the market. This approach implies an acceptance that in certain cases perfect competition may not be achievable and competition law therefore aims for workable competition, a view that was confirmed in *Metro I*⁴⁰.

Only two weeks after the decision in *Société Technique Minière*, the Court assessed a similar distribution agreement, but considered it as infringing EC competition law. The reason for the different treatment of the two cases stemmed from the fact that in *Consten & Grundig*⁴¹ the distributor was granted absolute territorial protection, whereas the agreement in *Société Technique Minière* allowed parallel importation and re-exportation, thereby offering a lesser degree of exclusivity. Comparing the two cases, it emerges that the Court took the view that an agreement such as the clause in *Consten & Grundig*, which had as its very object the distortion of competition, could be condemned under Article 81(1) without requiring any further analysis of the market circumstances⁴². It follows that in EC competition law there also exists a concept of *per se* restrictions, in so far as agreements, which have the very object of distorting competition, fall foul of Article 81(1) in any case, making it impossible to remove such agreements from the scope of Article 81(1), even if they are necessary to establish competition⁴³. However, it is important to keep in mind that in contrast to the situation in US antitrust law, even agreements which

⁴⁰ Case 26/76 *Metro SB Großmärkte v. Commission* (No 1) [1977] ECR 1875, at para 20; see Lane, R., *EC Competition Law* (Pearson Education Limited, Harlow, 2001), at p. 98.

⁴¹ See Cases C-56&58/64 *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299.

⁴² *Ibid*, at p. 342, “for the purpose of applying Article 85(1) [now 81(1)], there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition”.

⁴³ See Case T-148/89 *Tréfilunion SA v. Commission* [1995] ECR II-1063, at para 109, where the Court of First Instance pointed out that “the fact that the infringement of Article 85(1) [now 81(1)] of the Treaty [...] is a clear one necessarily precludes the application of a rule of reason, assuming such a rule to be applicable in Community competition law, since in that case it must be regarded as an infringement *per se* of the competition rules”; see also Case C-235/92 *Montecatini SpA v. Commission* [1999] ECR I-4539, at para 133.

have the object of distorting competition may still be allowed, provided they satisfy the conditions set out in Article 81(3).

Analysing subsequent case law of the European Court of Justice and the Court of First Instance, it becomes clear that agreements restricting competition will usually only fall outwith the prohibition in Article 81(1) if they are not hardcore anti-competitive, pursue a legitimate objective compatible with competition law aims and the restraint is ancillary to the existence of the agreement and proportionate to the end pursued. Thus, restrictive practices were held to fall outside the scope of Article 81(1) in *Nungesser*⁴⁴, where the Court agreed that without the grant of an exclusive open licence, a trader might be deterred from accepting the risk of marketing a new product, in *Pronuptia*⁴⁵, where restrictive provisions in a franchising agreement were held to be indispensable for such agreements to function and in *Remia*⁴⁶, where the Court took the view that non-competition clauses included in the sale of an undertaking were necessary to the transfer of an undertaking. Similarly, the Court has found that certain restrictive rules of an agricultural co-operative, such as the prohibition on members joining competing co-operatives, did not fall foul of Article 81(1) as long as they were necessary to ensure that the co-operative functioned properly⁴⁷.

The case for the existence of a “rule of reason” in EC competition law has not only been based on the aforementioned case law, but also on other decisions in which the Court has undertaken an extensive legal and economic analysis when assessing an agreement under Article 81(1). In this context, the Court has repeatedly stressed that “account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned”⁴⁸. However, such an analysis of the nature and economic context of a

⁴⁴ Case C-258/78 *L.C. Nungesser KG and Kurt Eisele v. Commission* [1982] ECR 2015.

⁴⁵ Case C-161/84 *Pronuptia de Paris GmbH v. Pronoptia de Paris Irmgard Schillgallis* [1986] ECR 353.

⁴⁶ Case C- 42/84 *Remia BV and Verenigde Bedrijven Nutricia NV v. Commission* [1985] ECR 2545.

⁴⁷ Case C-250/92 *Gøttrup-Klim v. Dansk Landbrugs Grovareselskab* [1994] ECR I-5641, at paras 34 - 35.

⁴⁸ Cases T-374 etc/94 *European Night Services v. Commission* [1998] ECR II-3141, at para 136, in the same sense, see *Gøttrup-Klim*, at para 31 and Case C-399/93 *H.G. Oude Luttikhuis and Others v. Verenigde Cooperatieve Melkindustrie Coberco BA* [1995] ECR I-4515, at para 10.

restrictive agreement does not necessarily mean that the Court has adopted a balancing approach, weighing up the pro- and anti-competitive effects. This has been confirmed by the Court of First Instance in *Métropole Télévision (M6)*⁴⁹, where the Court took the view that previous case law could not “be interpreted as establishing the existence of a rule of reason in Community competition law”, but was rather “part of a broader trend in the case law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) [now 81(1)] of the Treaty”⁵⁰. The Court of First Instance also pointed out that an approach whereby account is taken of the legal and economic context of a restrictive practice, “does not mean that it is necessary to weigh the pro- and anti-competitive effects of an agreement when determining whether the prohibition laid down in Article 85(1) [now 81(1)] applies”⁵¹. It is interesting to note, though, that the Court of First Instance allowed a balancing approach under Article 81(3)⁵². This stands in contrast to case law by the Court of Justice, which has always interpreted Article 81(3) quite narrowly, only accepting agreements which strictly fulfil the four conditions for exemption.

In this context, it should be stressed that there exists a general disagreement between the Court of First Instance and the Court of Justice regarding the existence and scope of a “rule of reason” in EC competition law. Whereas the latter, albeit not explicitly referring to a “rule of reason”, has made clear that under certain circumstances, a restrictive agreement may escape the application of Article 81(1), the Court of First Instance has repeated the *Métropole Télévision* formula and emphasised that “the existence of such a rule [of reason] in Community competition law is not accepted”⁵³. It is very interesting that the Court of First Instance still has a different view on what the concept entails, insofar as it refers to a “weighing of pro and anti-competitive effects”, which has nothing to do with the Court of Justice’s approach under Article 81(1). Particularly after the Court’s decision in *Wouters*, which stretched the scope of a “rule of reason” even further, one would have

⁴⁹ Case T-112/99 *Métropole Télévision (M6) and Others v. Commission* [2001] ECR II-2459.

⁵⁰ *Ibid*, at para 76.

⁵¹ *Ibid*, at para 77.

⁵² *Ibid*, at para 74.

⁵³ *Van den Bergh Foods*, at para 106.

expected the Court of First Instance finally to come round to the idea that there exists a concept in EC competition law which accepts certain restrictive measures under Article 81(1).

In summary, the concept of a “rule of reason”⁵⁴ in EC competition law, as applied by the Court of Justice, entails that a restrictive practice will usually only escape the prohibition set out in Article 81(1) if, after a thorough analysis of the legal and economic context, the restriction of competition is considered to be necessary for the establishment of an agreement capable of encouraging competition on the market, is not hardcore anti-competitive and fulfils the criteria of proportionality. Such an interpretation of existing case law would therefore not disclose a trend to follow the US “rule of reason” approach, but merely constitutes a necessary limitation of the scope of EC competition law in the sense that it allows certain restrictions without which a legitimate agreement could not function in the first place⁵⁵. As pointed out by Whish: “The fact that the ECJ has handed down reasonable judgments does not mean that it has adopted a rule of reason in the sense in which that expression is used in the US”⁵⁶.

Taking into account the aforementioned case law on the matter, it emerges that the decisive factor determining whether a restrictive agreement falls outside the scope of Article 81(1) is the question whether, from a market orientated point of view, the restriction is a *conditio sine qua non* for the establishment of the agreement, which, in principle, enhances competition or whether the agreement is necessary to establish competition in the first place. Thus, non-economic considerations such as public interest or social concerns could originally not be taken into account when judging whether a restrictive agreement escapes the application of Article 81(1).

⁵⁴ Although it would probably be better to avoid the term in an EC law context, it is used in the absence of a more appropriate alternative.

⁵⁵ See also Fleischer, H., “Absprachen im Profisport und Artikel 85 EGV”, (1996) 6 WuW, p. 480; Weiß, W., “Transfersysteme und Ausländerklauseln unter dem Licht des EG-Kartellrechts”, (1998) 3 SpuRt, p. 99.

⁵⁶ Whish, R., *op. cit. supra* note 36, p. 102.

5.1.3.1. *Wouters* – Emergence of a New “Rule of Reason”?

In *Wouters*, the Court has accepted a rule by the Bar of the Netherlands prohibiting multi-disciplinary partnerships of members of the Bar and accountants as being “necessary in order to ensure the proper practice of the legal profession”⁵⁷, thereby citing public interest considerations. Having established that the provision at issue was liable to limit production and technical development within the meaning of Article 85 (now Article 81) (1) (b) the Treaty⁵⁸, the Court held that:

“Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) [now Article 81(1)] of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives⁵⁹. (...) a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) [now Article 81(1)] of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned”⁶⁰

After having analysed the nature and context of the restrictive practice at issue, the Court concluded that the Netherlands Bar was entitled to adopt a rule ensuring the independence of legal services and the observance of strict professional secrecy⁶¹. Thus, in contrast to previous case law, the Court held the restrictive agreement to be

⁵⁷ *Wouters*, at para 107.

⁵⁸ *Ibid*, at para 90.

⁵⁹ *Ibid*, at para 97.

⁶⁰ *Ibid*, at para 110.

⁶¹ *Ibid*, at para 105.

outside the scope of Article 81(1), not because it was necessary for the proper functioning of the Bar of the Netherlands, but owing to public interest considerations. The Advocate-General, on the other hand, took the view that when judging whether a restrictive agreement escaped the application of Article 81(1), the assessment should be limited to exclusively competitive objectives. Thus, Advocate-General Léger rejected the submission that the agreement at issue was not caught by the prohibition in Article 81(1) because it was necessary to protect the independence of legal services and the interest of clients, arguing that such reasoning would amount to “introducing into the provisions of Article 85(1) considerations which are linked to the pursuit of a public-interest objective”⁶². However, it is interesting to note that the Advocate-General, having dismissed the relevance of the public interest in respect of the prohibition set out in Article 81(1) of the Treaty, thought it possible to take account of social concerns and considerations connected with the pursuit of the public interest under Article 81(3) of the Treaty⁶³.

The Court’s decision in *Wouters* clearly added fuel to the discussion surrounding the status of the “rule of reason” concept in EC competition law. Bearing in mind the wording of Article 81(1), there seems to be little room to consider public interest objectives when judging whether a restrictive agreement is caught by the rules on competition. In this sense, up until *Wouters*, the Court has limited its evaluation of restrictive agreements to economic considerations⁶⁴. Having said that, one may wonder why the Court took the provisions at issue in *Wouters* as an occasion to change its interpretation of the “rule of reason” in EC competition law, paying attention to public interest considerations.

Analysing the role served by EC competition law in a Community context, it is evident that its primary objectives are mainly market orientated. Articles 81 and 82 were included in the Treaty in order to prevent distortion of the market caused by large aggregations of economic power, whether in the form of monopolies or of cartels and to enhance market efficiency. Besides, EC competition law was intended to help the creation of a single European market and arguably even as a means to

⁶² AG Léger in *Wouters*, at paras 104 – 105.

⁶³ *Ibid*, at para 113.

⁶⁴ It could be argued that *Metro I*, where the Court took account of the consumer interest, constituted the exception to the rule; still, in contrast to other public interest considerations, consumer interest is an aim principally recognised in EC competition law, though under Article 81(3).

protect consumers. All these objectives with maybe the exception of the last are strictly economically motivated and have no relation to public interest concerns. Hence, it does not come as a surprise that Articles 81 and 82 of the Treaty were worded in a manner that does not take into account any considerations which are not market related. Initially, this lack of possibilities to pay attention to social concerns or the public interest did not cause any problems, as the rules on competition were usually applied to the kind of agreements they had been intended to regulate, that is those of an exclusively economic character. However, as competition law found its way into a growing number of economic activities, it became evident that in some areas, the traditional competition law instruments did not fit the circumstances⁶⁵. Particularly in cases where an industry was not only guided by the forces of supply and demand, but fulfilled a role in the public interest, tensions were unavoidable as the competition rules were simply not equipped to deal with practices which may have been restricting competition, but were inherent in the pursuit of social or public interest objectives. Especially in recent years, competition law has progressively advanced into subject matters to which it was originally not intended to apply, such as collective bargaining⁶⁶, culture⁶⁷ and of course, sport, in the case of which the Court has on several occasions conveniently passed on the chance to apply the competition rules⁶⁸. The regulations at issue in *Wouters*, intended to ensure the proper practice of the legal profession in the Netherlands, are another example of a restrictive practice where competition law and social concerns do not sit together easily. Considering that, it does not seem satisfactory that in such cases, the public policy aspect of an agreement should be ignored completely and practices, which have a positive effect on society overall, are deemed to be illegal owing to the competition rules. The Court in *Wouters* has recognised this dilemma and closed the legislative hole in Article 81 by taking into account public interest concerns.

⁶⁵ See also Lewis, A., Bell, A., Chilvers, C. et al. (eds.), *op. cit. supra note 18*, p. 346 who point out that “the competition rules of the EC Treaty were drafted with more orthodox industries in mind than sport”.

⁶⁶ Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

⁶⁷ Cases COMP/34.657 *Sammelrevers* and COMP/35.245 - 35.251 *Einzelreverse* concerning German and Austrian book price fixing agreements.

⁶⁸ However, see the recent judgment of the Court of First Instance in *Meca-Medina*, which has touched on the issue of sport in competition law, but for already mentioned reasons probably does not represent the Court of Justice’s approach.

Although this approach is not supported by the wording in Article 81, it is not as far-fetched as it probably seems. First of all, it is universally acknowledged that EC competition law is aware of imperfections in the market and consequently does not aim for perfect, but workable competition. However, obstacles to perfect competition may not only be caused by market structure, but can be the result of special characteristics of the goods that are traded. Thus, where a good or service fulfils a task in the public interest, it cannot be marketed like any other goods without losing its beneficial effect on society. To take the German and Austrian book price cartels as an example⁶⁹: if it is a public policy goal that consumers should be encouraged to buy “elevating” literature, prices cannot be determined solely by supply and demand, as readers could not afford to buy such publications⁷⁰. The regulation at issue in *Wouters* is another example where the special character of the product in question, legal services in the Netherlands, required that they were marketed in a certain way to ensure the public interest. Similarly, social concerns should be taken into account when assessing sporting regulations that support youth development or the grassroots level.

The European Court of Justice is no stranger to adopting a “rule of reason” approach in cases where the wording of the Treaty does not allow enough room for exceptions. In this sense, some writers⁷¹ have identified an analogy between *Wouters* and the Court’s decision in *Cassis de Dijon*⁷². Indeed, one can detect a number of parallels between the two cases. First of all, both Treaty articles concerned have the objective of protecting the Common Market, albeit with the difference that Article 28 is primarily addressed to the Member States, whereas Article 81 regulates the market conduct of private undertakings. Also, in contrast to Article 81(3), Article 30 allows

⁶⁹ See Lamping, A. & Ludwigs, M., “Die kartellrechtliche Bedeutung des Buches als Wirtschafts- und Kulturgut nach europäischem Gemeinschaftsrecht: Sind Bücher anders?” (1999) 40 ZfRV, p. 56.

⁷⁰ It should be noted, though, that the amended “Sammelrevers” was not issued a negative clearance owing to the cultural significance of books, but because the new system was restricted to the German market and allowed cross-border selling of German books and as such was deemed not to affect trade between Member States; see Commission press release IP/02/461, “Commission accepts undertaking in competition regarding German book price fixing”, 22.3.02.

⁷¹ See for example O’Loughlin, R., “EC Competition Law and Free Movement Rules: An Examination of the Parallels and their Furtherance by the ECJ *Wouters* Decision”, (2003) 2 ECLR, p. 68; see also Lamping, A. & Ludwigs, M., *op. cit. supra note 69*, p. 57, who developed the idea of an analogous interpretation of Articles 81 and 28 even before *Wouters*.

⁷² Case 120/78 *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

exemptions based on the public interest; however, more importantly, both articles have an exhaustive list of justifications, which have consistently been interpreted narrowly by the Court. Having said that, the main parallel between *Cassis de Dijon* and *Wouters* lies in the fact that in both cases the Court adopted a “rule of reason” approach whereby restrictions on the free movement of goods, and respectively on the free market, were held to fall outside the scope of the initial prohibition. By introducing the concept of mandatory requirements, the Court has significantly restricted the scope of Article 28 as the *Dassonville*⁷³ principle was considered too broad. Moreover, the list of mandatory requirements has been progressively extended throughout the years. By analogy with *Cassis de Dijon*, the Court in *Wouters* has introduced a necessary limitation to the scope of Article 81(1), in the sense that restrictive practices which are justified by the public interest may escape its application. The fact that the obstacle to trade was established by a private association, rather than a Member State is thereby irrelevant. However, as with *Cassis de Dijon*, only those restrictive practices that are strictly necessary for the achievement of the legitimate aim in question will escape the prohibition established in Article 81(1) of the Treaty⁷⁴.

5.1.4. The Application of the “Rule of Reason” to Sporting Measures

In the last few years, the Commission, through official publications and speeches by Community officials, has established certain guidelines regarding its approach to the subject of competition law and sport. First of all, it confirmed that provisions inherent to a sport and/or necessary for its organisation, do not fall within the scope of Articles 81 and 82 of the Treaty, provided they are applied in an objective, transparent and non-discriminatory manner⁷⁵. Secondly, owing to the special economic characteristics of sport, the Commission has acknowledged the need for

⁷³ See Case 8/74 *Procureur du Roi v. Dassonville* [1974] ECR 837.

⁷⁴ *Wouters*, at para 97.

⁷⁵ See for example, Speech Monti, M., *op. cit. supra note 26*; Speech Schaub, A., Jornada dia de la competencia, Madrid, *op. cit. supra note 26*; Speech van Miert, K., *op. cit. supra note 26*; Speech Pons, J.-F., *op. cit. supra note 26*, p. 6; Commission press release IP/99/133, *op. cit. supra note 26*; Helsinki Report on Sport, *op. cit. supra note 26*, p. 8.

rules which are strictly necessary to maintain a reasonable degree of uncertainty as to results, including measures preserving a certain equality in sporting competitions. In this context it is interesting to note that the Commission seems to have deflected from its initial point of view that such rules were restricting competition, but eligible for an exemption under Article 81(3), to considering them to be outside the scope of the provisions on competition⁷⁶. Taking into account existing case law concerning sporting rules and decision-making practice of the Commission, it is evident that there exists a “rule of reason” for sport in EC competition law. However, sporting rules have usually been dealt with on a case-by-case basis, which is why it is quite difficult to predict when a sporting rule will escape the scope of the prohibition in Article 81(1) of the Treaty. Moreover, having established that *Wouters* marks the beginning of a new “rule of reason”, it has to be examined in what sense this influences the application of EC competition law to sport. Considering the repeatedly mentioned social, cultural and educational characteristics of sports, the acceptance of public interest objectives under Article 81(1) could undoubtedly provide sports associations with an effective weapon in their fight against the application of EC competition law to sporting matters. However, although professional sport may have a positive effect on society to a certain extent, this does not mean that any restrictive measure which benefits a particular sport necessarily serves the public interest. The Court has made it clear that apart from an assessment of the overall context of a restrictive practice, account must be taken of its objectives⁷⁷, which means that only sporting rules which have been adopted in order to pursue a public interest objective will fall outside the scope of Article 81(1). However, as with the “rule of reason” approach under Article 39(1), it could be argued that the protection of freedom of association is in the public interest as such, which means that proportionate measures that are in the interest of sport may be accepted under the *Wouters* case law. Such an interpretation, according to which sporting interest protected by the right of association must be taken account of under the “rule of reason”, would also ensure that this basic right is paid the necessary attention, making a separate balancing test generally unnecessary. Apart from that, the Court in *Wouters* has also taken into

⁷⁶ See the contrast between Commission press release IP/99/133 and the Helsinki Report on Sport, p. 8, (both from 1999) on one side, and Monti’s speech from 26.2.01 on the other.

⁷⁷ *Wouters*, at para 97.

account the consumer interest in its analysis under Article 81(1), which leaves the question whether any rule that is necessary to improve the product football from a supporter's point of view, will escape the application of Article 81(1) of the Treaty. Evidently, the limitations of the *Wouters* "rule of reason" are still unclear, but one would assume that the Court is going to interpret the concept narrowly, not only when determining if a restriction is in the public interest, but also whether it is proportionate. Moreover, it should be kept in mind that measures which have the very object of distorting competition will not be open to justification under the "rule of reason".

When the application of competition law to sporting matters is examined, it is possible to distinguish between different categories of sporting rules. Firstly, those which are necessary for the organisation of sport and as such would already have been accepted under the pre-*Wouters* case law and secondly, restrictive practices which may be justified by reason of public interest considerations under *Wouters*. Thus, parallels between the competition rules and the provisions on free movement emerge. In both cases restrictive measures may be accepted provided they are inherent to the existence of sporting competition, as without them, neither competition nor free movement would be possible in the first place. More importantly, the Court has adopted a "rule of reason" approach in *Bosman*, as well as *Wouters*, opening up the possibility for restrictive sporting rules to be justified by sporting considerations.

5.1.4.1. Rules Necessary for the Organisation of Sport

The Court has repeatedly recognised that restrictive agreements which are necessary to have competition in the first place, respectively anti-competitive elements inherent in the existence of a legitimate agreement are not caught by the prohibition in Article 81(1). Thus, sporting rules which are inherent to a sport do not fall within the scope of Article 81(1), even if they have a certain economic context and restrict competition. However, it will be very difficult to prove that a particular rule is so vital that without it, sporting competition could not function at all. In order to determine whether a particular sporting rule is necessary for the organisation of a sport, the special economic circumstances and the fact that sporting competition works differently from competition in any other market, have to be taken into

account. If one takes the selection rules in *Deliège* as an example, it becomes clear that the rules in question undoubtedly constituted a restriction of competition by limiting the number of athletes allowed to participate in international tournaments and preventing other judokas from competing⁷⁸. However, without a restriction on the number of athletes, it would be impossible for organisational reasons to stage an international judo competition. Although it has been argued that less restrictive measures would have been available in the particular case⁷⁹, selection rules, in principle, are not caught by the prohibition in Article 81(1), as they are necessary for the organisation of sports tournaments⁸⁰.

Accordingly, provisions limiting the number of clubs allowed to participate in international competitions such as the UEFA Cup or the UEFA Champions League would also have to be considered as being legitimate in EC competition law. Similarly, the system of relegation and promotion is inherent in the organisation of European team sports, in particular as the US alternative of closed sports leagues constitutes a greater restriction to competition than a limitation on the number of teams promoted to a higher league each season.

Another example for a rule that was deemed to be necessary for the organisation of a sport is the so-called *Mouscron* case, where the Commission rejected a complaint regarding the “home and away” rule in the UEFA Cup⁸¹. The UEFA regulation, according to which participating teams are not permitted to play their home matches on another club’s ground, was considered a necessary part of the organisation of sporting competitions and as such fell outside the scope of Article 81(1).

In the *ENIC* case, a UEFA rule prohibiting two clubs under common control from participating in the same competition was accepted as being necessary to ensure

⁷⁸ It should be noted that judokas are not considered to be workers, but providers of services, which means they are likely to be treated as undertakings in EC competition law.

⁷⁹ See point 3.2.3.1 above.

⁸⁰ See Speech Monti, M., *op. cit. supra* note 26, where Commissioner Monti expressed the opinion that the selection rules at issue in the *Deliège* case did not infringe Article 81(1), as they were necessary for the organisation of judo.

⁸¹ See Commission press release IP/99/965, “Limits to application of Treaty competition rules to sport: Commission gives clear signal”, 9.12.1999

the integrity of sporting competition⁸². Hereby it is interesting to note that before assessing whether the agreement constituted a restriction of competition, the Commission cited relevant passages from the Court's decision in the *Wouters* case⁸³. The Commission subsequently stressed that the sporting rule at issue was "inherent in the pursuit of the very existence of credible pan European football competitions", as without it, consumers would sooner or later lose faith in the fairness and honesty of the competition⁸⁴. Hence, the rule on the integrity of UEFA club competitions was considered an essential tool to keep the consumers' interest in the competition, ensuring its marketability. Despite the fact that the Commission seemingly applied the *Wouters* case law, arguing that the possible negative effects of the rule at issue were "inherent in it for the pursuit of an objective such as the integrity of pan European football competitions"⁸⁵, it is interesting that the Commission in fact examined, whether from a purely market orientated angle, the UEFA rule was necessary to ensure the very existence of sporting competition, rather than invoking public interest considerations. However, the fact that *Wouters* was considered important enough to cite almost full paragraphs of the decision implies that the acceptance of public interest considerations in *Wouters* may be used as a reason to defend sporting rules pursuing legitimate sporting aims.

A rather confusing example of the application of competition law to sporting measures is the already mentioned case of the anti-doping legislation at issue in *Meca-Medina*. The Commission, when confronted with the subject, established first of all that the rules did not have the object of restricting competition, as they were purely intended to combat doping⁸⁶. Having pointed out that anti-doping measures could have the effect of limiting athletes' economic activities, the Commission went on to state that such a limitation not necessarily restricted competition in the sense of Article 81, as it could be inherent to the organisation and proper functioning of

⁸² See Commission Case COMP/37806 *ENIC/UEFA*, rejection of complaint of 25 June 2002, at para 42; prior to that, the same rule had been the subject of a decision by the Court of Arbitration for Sport, Case 98/200 *AEK Athens and Slavia Prague v. UEFA*, where it was considered necessary to maintain the integrity of sporting competition; having lost before the CAS, ENIC subsequently filed a complaint with the Commission.

⁸³ Case COMP/37.806 *ENIC/UEFA*, rejection of complaint of 25 June 2002, at para 31, citing paras 97 and 110 of *Wouters*.

⁸⁴ *Ibid*, at p. 10.

⁸⁵ *Ibid*, at p. 11.

⁸⁶ Case COMP/38.158 *Meca-Medina & Majcen*, rejection of complaint of 1 August 2002, at para 41.

sporting competition⁸⁷. In support of this argument, the Commission cited the same two paragraphs of *Wouters* as it had done in the *ENIC* case and concluded that anti-doping rules were necessary to ensure an equality of chances for athletes, their health and the integrity and objectivity of sporting competition, as well as the ethical values of sport⁸⁸. In respect of the applicants' argument that the fact that the rules at issue defined doping in an objective, rather than a subjective manner (that is to say depending on whether forbidden substances are present in an athletes body and not whether it can be proven that an athlete took them intentionally or negligibly) meant they were excessive, the Commission took the view that such an approach was necessary to ensure that doping was combated efficiently⁸⁹. Also, the Commission stated that, provided that anti-doping legislation was clear, transparent, objective, justified and non-discriminatory, it would leave it to the sports governing bodies and sports scientists to choose the approach they felt was best suited⁹⁰. Considering the rules at issue as justified, reasonable and equal, the Commission made clear that anti-doping measures were necessary for the proper functioning of sporting competition and the fight against doping and that the limitation of the economic freedom of athletes resulting from the application of these rules did not go beyond of what was necessary to achieve the objective⁹¹. Concerning the threshold for defining the presence of a banned substance in the body, the Commission established that such a practice was closely linked to the proper functioning of sporting competition and that the sports governing bodies and sports scientists were best suited to determine under which conditions doping may influence results, putting the equality of athletes' chances at risk⁹².

Analysing the reasoning behind the Commission's decision, it would appear that the anti-doping legislation was considered to fall outside the scope of the prohibition set out in Article 81 by reason of its necessity to ensure the functioning of sporting competition, guaranteeing the comparability of results. Having said that, it seems peculiar that at the hearing before the Court of First Instance, the Commission

⁸⁷ *Ibid*, at para 42.

⁸⁸ *Ibid*, at para 45.

⁸⁹ *Ibid*, at para 52.

⁹⁰ *Ibid*, at para 50.

⁹¹ *Ibid*, at para 55.

⁹² *Ibid*, at para 60.

stated that the disputed decision was based on “*Walrave, Donà and Delière* and therefore on the purely sporting nature of the anti-doping legislation at issue”⁹³. It added, “whilst it examined that legislation, albeit purely sporting, under competition law [...] it did so ‘in the alternative’ or more ‘for the sake of completeness’”⁹⁴. It is interesting to note that Commission officials pointed out at the time that the rationale behind the decision had been the criteria defined by the Court in *Wouters*⁹⁵. Moreover, in the official press release, the Commission was said to believe that “the anti-doping rules in question are closely linked to the smooth functioning of sport, that they are necessary for the fight against doping to be effective and that their restrictive effects do not go beyond what is necessary to achieve this objective” and that the measures were accordingly not caught by the prohibition under Articles 81 and 82 of the Treaty⁹⁶. Considering that no reference to the “purely sporting nature”⁹⁷ of the anti-doping regulations was made in either the Commission decision or the press release, it is very odd that the Commission claimed to have considered the rules at issue as “sporting legislation”⁹⁸, which, as such, escaped the rules on competition. If the Commission had thought that the sporting nature of the anti-doping rules had the effect that an analysis under competition law was unnecessary, why did it spend several pages on examining the *Wouters* case law, repeatedly emphasising that the measures were not caught by the Treaty because they were “inherent to the organisation and proper functioning of sporting competition”⁹⁹ – just “for the sake of completeness”?

Having already stated the inconsistencies in the approach adopted by the Court of First Instance¹⁰⁰, it is a lot more appropriate to argue that anti-doping rules do not come under the prohibition set out in Articles 81 and 82 by reason of their

⁹³ *Meca-Medina*, at para 62.

⁹⁴ *Ibid.*

⁹⁵ See Dussart-Lefret, C. & Sottong-Micas, C., “Deux nouvelles décisions clarifiant les règles sportives qui échappent aux règles de concurrence”, (2002) 3 Competition Policy Newsletter, p. 47.

⁹⁶ Commission press release, IP/02/1211, “Commission rejects complaint against International Olympic Committee by swimmers banned from competitions for doping”, 9.8.2002.

⁹⁷ See *Meca-Medina*, at para 62.

⁹⁸ *Ibid.*, at para 66.

⁹⁹ Case COMP/38158 *Meca-Medina & Majcen*, rejection of complaint of 1 August 2002, at para 42, similarly, see also paras 44 and 55.

¹⁰⁰ See point 3.2.3.4 above.

sporting necessity¹⁰¹. It is evident that fair and equal sporting competition cannot exist without such legislation and thus, it would most likely have been accepted even before *Wouters*. However, when considering whether anti-doping legislation is excessive, *Wouters* arguably leaves sports bodies a wider margin when choosing the method they consider best to combat doping - provided it is non-discriminatory and objective. Having said that, there is no reason to suggest that the approach adopted by the IOC went beyond what is necessary to guarantee an equality of results and thus, the existence of sporting competition.

When the above examples of sporting rules deemed vital for sporting competition are analysed, it emerges that it may sometimes be almost impossible to differentiate measures without which a sport could not exist and those which fall under the *Wouters* “rule of reason”. Apart from the fact that the Community institutions and national courts will often lack the inside knowledge to judge whether the chosen means are proportionate, it would also be very complicated to assess the exact impact of a rule. In practice, the distinction is methodological, as effectively the result remains the same, irrespective of the fact whether a sporting measure escapes the Treaty by reason of its sporting necessity or under the *Wouters* case law.

5.1.4.2. Measures Ensuring a Sporting Equilibrium

As previously mentioned, the Commission has repeatedly recognised the objective of maintaining a competitive balance in order to ensure an uncertainty of results as being legitimate in EC competition law¹⁰². However, from a strictly market orientated point of view, it could be argued that restrictive measures adopted by sports bodies in order to achieve a sporting balance are actually not strictly necessary for the functioning of professional team sports.

If it is assumed that the domination of a few teams over a lengthy period of time leads to a loss in profit for the dominating clubs, resulting from diminished spectators’ interest, it becomes clear that a certain competitive balance will benefit the stronger teams in the long run. Hence, just before the point where the bigger

¹⁰¹ See also Weatherill, S., “Anti-Doping Rules and EC Law”, (2005) 26(7) ECLR, p. 419, who points out that “there could be no true sport without anti-doping controls, so automatically to treat suspensions of offenders as restrictions within the meaning of Arts 49 and 81 EC would be out-of-context formalism at its worst”.

¹⁰² See for example, Speech Monti, M., *op. cit. supra* note 26.

teams would incur losses is reached, the dominating clubs would provide their smaller competitors with enough funds to ensure a competition that is balanced enough to keep the fans' interest. If balancing measures were only applied at a point when the league is already that unequal that the strongest clubs have lost profit, it is evident that a number of smaller clubs would have vanished in the process, resulting in a league with a smaller number of teams. Considering the number of clubs around Europe which are threatened with bankruptcy or have gone into liquidation, it is evident that the market forces are already at work and the balancing measures of the football governing bodies are not sufficient to keep all the clubs in the game. Strictly speaking it is not an objective in competition law artificially to keep producers in the market that would not survive in an unrestricted market. If one takes the Scottish Premier League (SPL) as an example, it could be argued that without the existence of balancing methods, the market could not sustain twelve clubs and in the long run probably not more than five teams would remain at the highest level: two Glasgow clubs, and one each in Edinburgh, Dundee and Aberdeen. In the case of any other industry, restrictive measures could not be justified with the argument that they were necessary to ensure the number of competitors in the market, even if it was in the interest of the consumer. For the SPL that would mean that if the market is too small for twelve clubs, but worked perfectly with five competitors, then so be it.

Considering the social and cultural importance of football, on the other hand, one may wonder once again whether football is in fact different to other markets. Apart from the fact that football clubs fulfil very important tasks in supporting the grassroots level and investing time and money in youth players, it is undeniable that the existence of a football club has a beneficial impact especially in small towns and rural communities, giving them a sense of belonging and community spirit. The example demonstrates the existing tension between sport and Article 81, suggesting that the strictly economically orientated competition law is too inflexible to deal with certain areas such as the sports industry where not only economic, but social interests are at stake. This underlines the importance of the *Wouters* decision, which accepts the public interest as a legitimate goal under the "rule of reason" concept in EC competition law. Despite the fact that the Commission has acknowledged the need for a competitive balance even before *Wouters*, it has to be stressed that the two main

objectives behind the introduction of balancing methods are the survival of competitors which would not survive in the market otherwise on one hand and the consumer interest in exciting sporting competition on the other, both goals which originally could not be taken into account when assessing an agreement under Article 81(1). Considering this, it becomes clear that only after *Wouters*, there is now a legitimate legal base for the recognition of the requirement for a sporting balance under Article 81(1) of the Treaty¹⁰³.

Having established that a professional sports league requires some degree of sporting balance, one may wonder what degree of balance between teams is necessary for the league to function and at what point balancing measures are distorting the market. For example, how would the Commission react in the unlikely event that the Scottish Football Association decided to make the SPL more attractive by redistributing the available television revenues in such a way that the two dominant teams Celtic and Rangers would not receive any funds, although games involving a team from the “Old Firm” generate the highest level of interest by far? Undeniably, the SPL suffers from a distinct competitive imbalance; however, taking into account that the league is still functioning, despite the fact that ten out of twelve teams have practically no chance of ever winning the championship, it emerges that there have to be limits as to what degree of intervention by the sports bodies in order to establish a sporting balance is acceptable. Moreover, the mechanism through which revenue is redistributed within the league has to be proportionate and must not go beyond what is necessary to achieve the required sporting balance. In this context, for example, the Commission has decided that the joint selling of television rights for the UEFA Champions League through UEFA was not necessary in terms of Article 81(1) to stage a football league, as a re-distribution of revenue could be undertaken in other ways without being linked to a joint selling arrangement¹⁰⁴.

¹⁰³ It should be pointed out, though, that measures necessary to ensure a sporting balance should have been eligible for exemption under 81(3), as they improve the production of the sporting good and are in the consumer interest.

¹⁰⁴ Commission Decision 2003/778 *Joint Selling of the Commercial Rights of the UEFA Champions League*, OJ 2003 L 291/25, at para 131, however, the agreement was eventually exempted under Article 81(3).

5.1.4.3. Transfer Restrictions

Transfer regulations are usually argued to be necessary for the proper functioning of sporting competition in so far as players are prohibited from moving between clubs at any given time. If there was no restriction on player movement at all, theoretically the composition of a team could completely change from one Saturday to the other, depending on the forces of supply and demand. It is evident that under such circumstances, sporting competition would lose any purpose and a certain consistency as regards team composition is necessary to keep fans interested. However, again the question is how much restriction is needed for the market to function – if the maximum duration of contracts was only one year and footballers could move freely at the end of each season, for example, would sporting competition not be possible?¹⁰⁵

Another possibility to regulate player movement are transfer windows, which have principally been accepted as being necessary for creating and guaranteeing a competition between clubs by Advocate-General Albers in the *Lehtonen* case¹⁰⁶. Although transfer windows may not always be strictly necessary for the very existence of sporting competition, they will usually be justified as a means to preserve the regularity and proper functioning of a league under the *Wouters* case law, as long as they are proportionate and do not go beyond of what is strictly necessary to ensure the legitimate goal.

5.1.4.4. Youth Development and Grassroots Sector

One of the main arguments for the preservation of the football transfer system has always been that through the transfer fees clubs receive for the sale of young players, particularly small clubs are encouraged to invest time and effort in youth development. Apart from the question whether this really is the case, one may wonder to what extent the support of the youth sector is a legitimate goal in EC competition law.

First of all, it has to be examined whether the encouragement of youth development may fall outside the scope of Article 81(1) by reason of its sporting

¹⁰⁵ The issue of transfer restriction ensuring a stability of contracts will be dealt with in depth in connection with the legal assessment of the 1997 Regulations, see point 6 below.

¹⁰⁶ AG Albers in *Lehtonen*, at para 106.

necessity. Although it could be argued that without youth development the supply of players would stop in the long run, the comparison with the US model shows that theoretically, a professional sports league can work without a financial link between professional and youth sectors. Furthermore, the recruitment of new, young players is also in the interest of the clubs, which means that in the absence of measures encouraging youth development, teams would maybe invest less money in the education of young players, but enough to keep the league going.

Having said that, the main rationale behind the introduction of measures encouraging youth development lies in the social significance of youth sport. Besides, it is evident the appearance of new and exciting young players certainly makes professional sport a lot more interesting for the consumer. Again, the *Wouters* case law comes to the rescue, as under a purely economically orientated “rule of reason” approach such measures could probably have not been recognised because they are not strictly necessary for the functioning of the professional sector¹⁰⁷.

The same argument comes into play in respect of restrictive practices that have the aim of supporting the grassroots level. In theory, amateur and professional sport are not interlinked to such a degree that the distribution of funds to the grassroots level could be claimed to be necessary for the functioning of professional sport. The fear that small clubs working at grassroots level could not survive without receiving a reward for investing in youth development cannot be used as an argument that such payments are inherent in the existence of football. As mentioned above, under a strictly market orientated approach, the aim of keeping competitors in the market which would not survive otherwise cannot be recognised. However, apart from their beneficial impact on the local community in general, the very existence of small clubs is of social interest owing to their involvement in the education of youngsters. Thus, only if social and public interest concerns may be taken into account when assessing a restrictive agreement under Article 81(1) of the Treaty, may such measures escape the scope of the competition rules.

¹⁰⁷ However, see AG Stix-Hackl in *Balog*, at paras 107 – 111, who, having cited the Court’s case law on ancillary restraints, pointed out that the aim of encouraging the training of young players had been recognised in *Bosman* and went on to consider the suitability of the transfer rules at issue to achieve the desired end. Although case law on free movement might be of some significance in competition law, the mere fact that the Court has acknowledged these sporting aims in *Bosman* cannot provide a sufficient legal base to take them into consideration under Article 81(1).

5.1.5. The Application of Competition Law to Labour Relations

In reference to the fact that footballers are classified as workers in the sense of Article 39, there have been arguments that as a consequence, the provisions of competition law were not applicable to them¹⁰⁸. Similarly, the European football association UEFA claimed in the proceedings to the *Bosman* case that the transfer system at issue was directly related to the employment relationship between club and footballer and as such fell outside the scope of EC competition law¹⁰⁹. Supporters of this view generally cite a Commission statement from 1990, establishing that the Commission does not intend to apply the competition rules to employment related issues¹¹⁰. It has to be pointed out, though, that the Commission has in fact examined collective labour agreements under competition law in the past¹¹¹.

EC competition law is applicable to restrictive agreements between undertakings. According to the Court, an undertaking is an “entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”¹¹². An individual will qualify as undertaking if and insofar he or she engages in economic or commercial activity in his/her own right¹¹³. The application of the competition rules to individuals has so far been confirmed for self-employed professionals such as lawyers¹¹⁴, property agents¹¹⁵, opera singers¹¹⁶ and also

¹⁰⁸ See for example Scholz, R. & Aulehner, J., “Die ‘3+2’-Regel und die Transferbestimmungen des Fußballsports im Lichte des europäischen Gemeinschaftsrechts”, (1996) 2 Spurt, p. 47; see also Gleiss, A. & Hirsch, M., *Kommentar zum EG-Kartellrecht* (Verlag Recht und Wirtschaft, Heidelberg, 1993), point 20 to Article 20.

¹⁰⁹ UEFA in *Bosman*, opinion AG Lenz, at para 271, claiming that the *Bosman* case was in fact a “concealed wage dispute”.

¹¹⁰ Written answer to question No 777/89, OJ 1990 C 328, p.3.

¹¹¹ Commission Decision 86/507 *Irish Banks’ Standing Committee*, OJ 1986 L 295/28, regarding an agreement on the opening hours of banks, concluded between an association of Irish banks and the Trade Union of Banks’ employees.

¹¹² Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron* [1991] ECR I-1979, para 2016; Case C-244/94 *Fédération Française des Sociétés d’Assurance v. Ministère de l’Agriculture et de la Pêche* [1995] ECR I-4013, at para 4028; Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, at para 5886.

¹¹³ Bellamy, C. & Child, G., *Common Market Law of Competition* (5th edn, Sweet and Maxwell, London, 2001), at para 2-006; Lane, R., *op. cit. supra* note 40, p. 34; Goyder, D., *op. cit. supra* note 36, p. 87, who states that private individuals engaged in any form of business, commerce or profession can be undertakings.

¹¹⁴ Case C-309/99 *Wouters v. Algemene Raad van de Nederlandse Orde van Avocaten* [2002] ECR I-1577.

¹¹⁵ Decision 95/188 *Coapi*, OJ 1995 L 122/37.

swimmers¹¹⁷. However, employees have been held not to qualify as undertakings in the sense of the Treaty, owing to the fact that they are not participating in the market as independent actors, but form an economic unit with their employer¹¹⁸. As a consequence, football players, who have been classified as workers in the sense of Article 39, would most likely not be considered undertakings and therefore fall outside the scope of the provisions on competition law¹¹⁹. However, agreements in the field of sport which are examined under competition law are generally not concluded between individual footballers, or even between club and player, but exist between clubs, respectively in the form of decisions by the football associations¹²⁰. The transfer rules, for example, are drawn up by the national and international football associations and even though they concern employment matters, the question whether such provisions are caught by competition law is not related to the fact that the individual player cannot be classified as an undertaking. The matter might be different, however, in cases where transfer clauses are enclosed in the individual contract between player and club. As pointed out in connection with the free movement of workers, sometimes club and player agree on a maximum transfer fee with a combined release clause when concluding the employment contract. Moreover, what if a player signs a long-term deal and decides to waive contractually any right that he might have under national employment laws to leave prematurely? Although an individual employment contract between club and player is not subject to the application of the provisions on competition law as a football player does not qualify as an undertaking, the situation might look different if all clubs in a league offer their players contracts with the same conditions, thereby giving rise to suspicions that a concerted practice between employers is in place.

¹¹⁶ Decision 78/516 *Rai/Unitel*, OJ 1978 L 157/39.

¹¹⁷ Case COMP/38158 *Meca-Medina & Majcen*, rejection of complaint of 1 August 2002, at para 42.

¹¹⁸ See Case C-40 etc./73 *Coöperative Vereniging "Suiker Unie" v. Commission* [1975] ECR 1663; Case C-22/98 *Criminal Proceedings against Jean Claude Becu* [1999] ECR I-5665; AG Jacobs in *Albany*, at para 217.

¹¹⁹ However, as pointed out in the context of the concept of worker in Article 39, some players have such a super-star status, including individual sponsorship deals, etc that it could be argued that they operate independently on the market and would thus qualify as undertakings.

¹²⁰ The question whether football clubs qualify as undertakings, and thus whether sporting rules established by football associations can be classed as decisions between an association of undertakings, will be tackled under point 6.1 below.

Thus, when the relationship between competition and employment law is examined, it emerges that the simple fact that employees cannot be classified as undertakings, does not remove all employment related agreements from the scope of competition law. Thus, a general exemption for employment matters is unjustified, particularly when it is taken into account that no evidence for such a restriction of scope can be found in the Treaty, a view that is supported by the majority of writers¹²¹.

5.1.5.1. Collective Labour Agreements

Despite the fact that employment issues are not exempted from competition law as such, it is a common belief that collective bargaining agreements, owing to their social, as opposed to economic purpose, should escape the application of Articles 81 and 82 of the Treaty¹²². Evidently, this would open up a possibility for the football industry to protect the transfer system from competition law, by including transfer regulations in a collective bargaining agreement between the clubs as employers' representatives on one side and the player's union on the other.

In contrast to the situation in the US¹²³, collective bargaining agreements are not automatically exempted from the application of EC competition law. However, despite the fact that collective agreements restrict competition between employees, they are actively encouraged by Community legislation¹²⁴, as they prevent employers from offering less than minimum wages and working conditions. Since the Treaty makes no reference to collective bargaining agreements, the question whether they should be exempted from competition law had to be resolved by means of

¹²¹ See for example Weiß, W., *op. cit. supra note 55*, p. 97, Fleischer, H., *op. cit. supra note 55*, p. 484 and AG Lenz in *Bosman*, at para 273.

¹²² Dutch, French and Swedish Government in Case C-67/96 *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, see opinion of AG Jacobs, at para 113; Weiß, W., *op. cit. supra note 55*, p. 97; Fischer, U., "Die Angst des Fußballs vor dem EG-Wettbewerbskommissar oder Tarifautonomie vs. Kartellrecht – Ein Spielbericht", (2002) 4 EuZW, p. 97; see also Fikentscher, A., "Kartellrecht im Sport – Ökonomische und Rechtsvergleichende Betrachtungen", (1995) 4 SpuRt, p. 151, in respect of the German perspective.

¹²³ Collective bargaining agreements are exempted from US antitrust law under the so-called "non-statutory labour exemption" case law developed in the 1960s, see *Amalgamated Meat Cutters v. Jewel Tea Co*, 381 US 676 (1965), in relation to collective agreements in sport, see *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); for further discussion on the subject see Corcoran, K., "When does the Buzzer sound?: The nonstatutory Labour exemption in professional Sports", (1994) *Columbia Law Review*, pp.1045-1075.

¹²⁴ For example Articles 4, 6, 17(3) and 18(1) of Council Directive 93/104/EC of 23 November 1993, OJ 1993 L 307/18.

interpretation. In this context Advocate-General Jacobs has pointed out that the Treaty should be read in such a way that neither the competition provisions, nor the rules encouraging collective agreements are emptied of their content and neither rule takes precedence over the other¹²⁵. Considering the nature and importance of collective labour agreements and the effect they have on competition, he proposed a limited antitrust immunity. Accordingly, three conditions have to be met for a collective agreement to be automatically exempted from Article 81 of the Treaty¹²⁶: First, the agreement must be made within the formal framework of collective bargaining between both sides of industry. Secondly, the agreement has to be concluded in good faith and should not be used as a cover for a serious restriction of competition between employers. Finally, the immunity only extends to agreements regarding core subjects of collective bargaining such as wages and working conditions and agreements which do not directly affect third parties. The Court of Justice followed the Advocate-General's opinion, pointing out that

“the social policy objective pursued by such [collective labour] agreements would be seriously undermined if management and labour were subject to Article 85(1) [now 81(1)] of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment” and confirming that “agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 85(1) [now 81(1)] of the Treaty”¹²⁷.

A collective agreement regulating the football transfer system would therefore escape the application of Article 81(1) only if it included the players' union and could not be drawn up by the club's representatives or the football associations alone. However, taking into account that the exemption from EC competition law only relates to collective agreements concerning working conditions, an agreement including provisions on the transfer of professional football players would go too far, as it does not merely regulate wages and working conditions, but the access to work. The transfer rules can hinder a player's move from one club to the other and thus go

¹²⁵ AG Jacobs in *Albany*, at para 179.

¹²⁶ AG Jacobs in *Albany*, at para 191.

¹²⁷ *Albany*, at paras 59–60.

beyond the core subjects of collective bargaining, which means that even if there was a collective agreement on the regulation of player movement, it would not be immune from the application of competition law.

Since a collective agreement concerning the regulation of player transfers would not automatically escape the provisions on competition law, the next step would be to judge on its compatibility with Article 81. Hence, it is necessary to determine whether it could be classified as an agreement between undertakings. Although employers undoubtedly qualify as undertakings, it has been a matter of dispute whether the same applies to trade unions. Since employees are not undertakings, unions usually do not qualify as an association of undertakings, at least when they are involved in collective bargaining¹²⁸. On the other hand, trade unions may be categorised as undertakings when they engage in an economic activity that is attributable to them. However, when bargaining with employers on behalf of the employees of a particular sector, they merely act as agent for the employees in question and not in their own right¹²⁹. Even though trade unions do not qualify as undertakings, a collective bargaining agreement might still fall within the scope of Article 81, as it presumes an agreement on the employer's side to negotiate jointly and to be bound by the result of the bargaining¹³⁰. When an undertaking takes part in collective bargaining on working conditions, it is engaged in an economic activity, as its ability to conclude an optimal collective agreement with its employees will undoubtedly affect its economic success¹³¹. This means that even if clubs and

¹²⁸ See AG Jacobs in *Albany*, at para 218; Lane, R., *op. cit. supra note 40*, p. 36; Bellamy, C. & Child, G., *op. cit. supra note 113*, at para 2-008; it should be noted that the situation is different for trade unions representing persons constituting undertakings themselves, in which case they may be considered associations of undertakings, see Commission Decision 2003/600 *French Beef*, OJ 2003 L 209/12, at para 109, concerning trade unions representing farmers; however, the Commission has recognised that work performed by these organisations such as information, advice and protection of their members' interests may be covered by the trade union freedom, protected by Article 12(1) of the EU Charter of Fundamental Rights; at the same time, the Commission has pointed out that trade unions step outside those terms of reference when they assist in the conclusion and implementation of agreements breaching competition law, *ibid*, at para 112.

¹²⁹ AG Jacobs in *Albany*, at para 227 ; Bellamy, C. & Child, G., *op. cit. supra note 113*, para 2-008; Lane, R., *op. cit. supra note 40*, p. 36.

¹³⁰ See also Commission Decision 86/507 *Irish Banks' Standing Committee*, OJ 1986 L 295/28, where it was argued that a collective agreement between Irish banks and the Trade Union of Banks' employees qualified as an agreement in the sense of Article 81, as it implied an agreement between the parties on whose behalf the collective agreement was made.

¹³¹ See AG Jacobs in *Albany*, at para 233.

players' associations managed to conclude a collective agreement on the conditions of player transfer between clubs, it would not be treated differently under competition law than an agreement solely between clubs. Hence, the conclusion of a collective agreement on the matter cannot be used to circumvent the rules on competition law or result in any special treatment.

5.1.6. The Geographical Scope of EC Competition Law

The question to what extent a state or a group of states may apply their laws to conduct carried out in the territory of another sovereign state has always been a controversial issue in international law. In respect of competition law, extraterritorial application was developed by US courts, which adopted the “effect doctrine”. According to this concept, jurisdiction over the economic conduct of companies located in third countries is based on the fact that the activities of those companies outside the US would have an effect on the economic situation within¹³². The European Court of Justice, on the other hand, initially based the application of the EC competition rules to anti-competitive conduct occurring outwith the Community on the economic entity doctrine. According to the Court, in cases where a company located outside the territory of the European Union was in direct control of its subsidiary within the Community, the market behaviour of the latter may be attributed to the parent undertaking¹³³. However, the economic entity doctrine did not provide the Community with jurisdiction over undertakings which did not have subsidiaries within its territory. In order to deal with anti-competitive behaviour of undertakings with no economic links to companies within the Community, the Court adopted the “implementation doctrine”, according to which EC competition law may be applied to restrictive agreements concluded by undertakings located outside the EU, provided that the agreements were implemented inside the Community¹³⁴. Without going into detail as to whether later case law implies that Community law has recognised an effects doctrine comparable to the American approach¹³⁵, it is

¹³² See for example *United States v. Aluminium Company of America (Alcoa)* 148 F 2nd 416 (2nd Circ 1945).

¹³³ See Case 48/69 *ICI v. Commission* (Dyestuffs) [1972] ECR 619.

¹³⁴ Cases C-89 etc. /85, *Åhlström v. Commission* (Woodpulp) [1988] ECR 5193, at paras 16 – 18.

¹³⁵ See Case T-102/96 *Gencor v. Commission* [1999] ECR II-753.

evident that only because an undertaking is based outside the Community this does not automatically remove it from the scope of EC competition law.

With regard to sporting rules, the issue of the extraterritorial application of the Community competition rules has arisen in particular in the context of football. Thus, one argument used against the application of EC competition law to the FIFA transfer regulations was based on the fact that FIFA, as well as UEFA are private associations with their seats, and management, in Switzerland. Considering that the national football associations in the Member States are all part of FIFA and UEFA and as such bound by their decisions, though, it is arguable that sporting rules adopted by the international football associations are subject to the application of EC competition law under the economic entity doctrine¹³⁶. However, even if the existence of the necessary economic link between the national football associations and FIFA, respectively UEFA is denied, sporting rules established by the international football associations would be caught by EC competition law as soon as they are implemented inside the Community. Thus, the fact that the two international football associations FIFA and UEFA are based in Switzerland cannot remove the transfer regulations from the scope of EC competition law.

¹³⁶ See Lane, R., *op. cit. supra* note 40, p. 285.

6. THE 1997 FIFA REGULATIONS UNDER ARTICLE 81

6.1. UNDERTAKINGS/ASSOCIATIONS OF UNDERTAKINGS

It has repeatedly been stated that the 1997 transfer regulations were adopted by FIFA, the international football association. Thus, before judging whether these rules did in fact restrict competition, it is necessary to assess whether they are a result of an agreement between undertakings or an association of undertakings. The notions of “undertakings” and “associations of undertakings” are not defined in the Treaty. As mentioned above, the Court has defined an undertaking as “any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed”¹³⁷. Since every football club is a member of a national association and every national association is a member of FIFA, it makes sense to start at the bottom of the pyramid, assessing whether the clubs may be classified as undertakings, before deciding whether FIFA is an undertaking in its own right.

In *Bosman*, the football federations claimed that football clubs did not qualify as undertakings; it was argued that the economic activity of most football clubs was negligible, as they operated at a loss¹³⁸. Moreover, it was submitted that “in most cases” teams did not have the intention of making profit and the only rationale behind economic ambitions of football clubs was sporting and not financial success¹³⁹. Unsurprisingly, both arguments were rejected by the Court. Considering the financial resources of football clubs and the economic value of transfer fees and broadcasting rights, it is hardly disputable that football clubs are engaged in an economic activity. Many of the major clubs are quoted on the stock exchange and earn millions through the sale of merchandise or gate receipts. Furthermore, it does

¹³⁷ Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron* [1991] ECR I-1979, at para 21.

¹³⁸ This might be true for a lot of lower league clubs, but not for the majority of clubs playing in the top divisions. According to Deloitte & Touche, Premiership clubs reported operating profits of £ 149 million in 2003/04, another record high (up £ 25 million on the previous record) with only four clubs making losses at the operating level. However, taking the English Football League in total, in 2002/03 the 92 clubs reported a record pre-tax loss of £ 204 million.

¹³⁹ *Bosman*, at para 70 and 72, in favour of this argument, Scholz, R. & Aulehner, J., *op. cit. supra* note 108, p. 44.

not matter for what reasons an undertaking is economically active - otherwise, not only charities, but also companies in other lines of business could claim that they were not interested in financial success, but pursue a higher cause and thus, did not qualify as undertakings. The concept of undertaking in EC competition law does not require an intention to make profit¹⁴⁰, which means that football clubs are undoubtedly to be regarded as undertakings¹⁴¹.

National and international football associations may consequently be qualified as associations of undertakings, or as associations of associations of undertakings respectively. The fact that also a large number of amateur clubs belong to those associations makes no difference, as long as the associations are at least formed by economically active clubs¹⁴². However, in so far as they themselves engage in economic activity, such as the marketing of broadcasting rights or the conclusion of sponsoring agreements, football associations are undertakings in their own right, a fact that has also been confirmed by case law¹⁴³ and decision-making practice of the Commission¹⁴⁴. Thus, FIFA's argument brought forward in *Balog* that it was a grouping of national associations and did not itself pursue economic objectives¹⁴⁵, was rejected by Advocate-General Stix-Hackl, pointing out that it is irrelevant whether an undertaking pursues a social or sporting goal, provided that some activities of the association are of an economic nature¹⁴⁶.

¹⁴⁰ Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others v. Commission* [1980] ECR 3125, at para 88.

¹⁴¹ See also the recent decision in Case T-193/02 *Laurent Piau v. Commission* [2005] 5 CMLR, p. 2, at para 69; AG Lenz in *Bosman*, at para 255; AG Stix-Hackl in *Balog*, at paras 45 – 55; Decision 2003/778 *Joint Selling of the Commercial Rights of the UEFA Champions League*, OJ 2003 L 291/25, at para 106; Weiß, W., *op. cit. supra note 55*, p. 98; Fleischer, H., *op. cit. supra note 55*, p. 474.

¹⁴² See *Piau v. Commission*, at para 70; AG Lenz in *Bosman*, at para 256; AG Stix-Hackl in *Balog*, at para 61; See also Case COMP/36.583 *SETCA-FGTB/FIFA*, rejection of complaint of 28 May 2002, at para 30.

¹⁴³ See *Piau v. Commission*, at para 71; Case T-46/92 *Scottish Football Association v. Commission* [1994] ECR II-1039, where the Court of First Instance did not even question the fact that football associations are undertakings.

¹⁴⁴ Decision 92/521 “*Distribution of package tours during the 1990 World Cup*”, OJ 1992 L 326/31, at para 49; Decision 2003/778 *Joint Selling of the Commercial Rights of the UEFA Champions League*, OJ 2003 L 291/25, at para 106.

¹⁴⁵ See AG Stix-Hackl in *Balog*, at para 37.

¹⁴⁶ See AG Stix-Hackl in *Balog*, at para 58.

6.1.1. The “Single Entity” Theory

Despite the fact that there is a general consensus over the fact that football clubs are undertakings for the purpose of EC competition law, conflicting views still exist. These are mainly based on a concept developed by the American economist Walter Neale in the 1960s, the so-called “single entity” theory¹⁴⁷. This hypothesis, which has been evoked in a number of antitrust proceedings against American sports leagues¹⁴⁸, relies on the already examined “peculiar economics of sport”, in particular on the fact that no club is able to produce a marketable good on its own and thus all clubs in a league are required to work together. The special dynamics in professional team sports have given rise to the argument that, owing to the economic dependency between clubs, the league was to be regarded as a single entity. Hence, sporting rules such as the transfer system are claimed to be internal decisions within one undertaking to which competition law does not apply.

It is an acknowledged principle in EC competition law that in certain circumstances legally distinct firms may be regarded as a single unit because of the close economic links between them. According to the Court, this is the case with agreements between parent and subsidiary, where both firms are part of one economic unit “within which the subsidiary has no real freedom to determine its course of action on the market”¹⁴⁹. However, when analysing the economic relations between clubs in a football league, it becomes clear that although there is a certain dependency between teams, each club is effectively economically independent. This is illustrated by the fact that each club makes its own investment decisions, acts individually on the transfer market and carries its own financial risk. Although a league format requires a certain degree of co-operation between clubs, such as the setting up of a fixture list and may even involve the collective marketing of broadcasting rights, it cannot be denied that clubs compete against each other

¹⁴⁷ See Neale, W., *op. cit. supra note 9*, pp. 1–14; in favour of the single-entity approach see Scholz, R. & Aulehner, J., *op. cit. supra note 108*, p. 47; against, Fleischer, H., *op. cit. supra note 55*, p.477 - 478.

¹⁴⁸ See Fleischer, H., *op. cit. supra note 55*, p. 477.

¹⁴⁹ See Case T-102/92 *Viho v. Commission* [1995] ECR II-17, at para 16.

economically, as well as on a sporting level and do not constitute a single economic unit¹⁵⁰.

6.2. AGREEMENTS BETWEEN UNDERTAKINGS

Having established that football clubs, as well as national and international football associations qualify as undertakings, respectively associations of undertakings, it is necessary to consider whether the transfer rules are based on agreements between undertakings or decisions of associations of undertakings. Taking into account that national transfer regulations are determined by the rules of the relevant association, while FIFA's transfer rules are issued by its executive committee¹⁵¹, it seems obvious that they are based on a decision of an association of undertakings, the clubs¹⁵². There have been claims, though, that the transfer system merely reflects the will of the members of the associations and thus should be classed as an agreement between clubs, rather than a decision of the national or international football association¹⁵³. However, as pointed out by Advocate-General Lenz, Article 81 applies in the same way to both forms of co-ordination, which means that the distinction is of purely academic relevance¹⁵⁴.

¹⁵⁰ In contrast see the US case *Fraser v. Major League Soccer*, 284 F 3rd 3d 47 (1st Circ 2002). The decision concerned the US Major Soccer League which, when it was formed in 1995, was organised in such a way that investors purchased shares of the league as a whole with the right to manage a particular team in return for an annual management fee. All assets, including the teams, intellectual property, player contracts, etc. are owned by the league and not by the individual clubs; investors share profits and losses in proportion with their investment. The centralised employment scheme was challenged by several players who argued that the league's single entity structure was a "sham" and violated Section 1 of the Sherman Act. However, the District Judge in question dismissed the action with the argument that the US soccer league constituted a single entity and as such was incapable of committing a violation of Section 1 of the Sherman Act, a decision which was upheld by the Court of Appeal. For a deeper discussion of the case see Wright, P. "Major league Soccer: Antitrust, the Single Entity, and the Heightened Demand for a Labor Movement in the New Professional Soccer League", (2000) 10 Seton Hall J. Sports L., pp. 357–387.

¹⁵¹ See in particular FIFA Circular No 616 of 4 June 1997, point 2, which reflected a decision of the FIFA Executive Committee, stating that in case of the unilateral termination of a contract by a player, the player in question would not be eligible to play for another club.

¹⁵² See also *Piau v. Commission*, at para 75, where the Court of First Instance confirmed that regulations concerning the activity of players' agents issued by FIFA's executive committee constitute a decision by an association of undertakings within the meaning of Article 81(1).

¹⁵³ See the Belgian Football Association URBSFA in *Bosman*, opinion AG Lenz, at para 258.

¹⁵⁴ AG Lenz in *Bosman*, at para 258; see also AG Stix-Hackl in *Balog*, at para 67.

Another issue, brought up by the Italian government in the proceedings to the *Balog* case, is the fact that in some countries, regulations of sporting associations may be attributed to the state¹⁵⁵. As pointed out by Advocate-General Stix-Hackl, such measures may also be covered by Community law, but would have to be examined in the light of Article 10 in conjunction with Article 81 of the Treaty¹⁵⁶.

6.3. RELEVANT MARKET

In any case of an alleged infringement of Articles 81 or 82, it is necessary to analyse the relevant market before assessing the situation under the competition rules. Only after the market is defined precisely, is it possible to determine whether an agreement between undertakings distorts competition and/or whether an undertaking occupies a dominant position. The relevant market is defined by two different elements: the product market, which “comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use” and the geographical market, which is “the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas”¹⁵⁷.

When the given definition of the relevant product market is analysed, it is evident that the most significant factor is demand substitutability. Thus, in order to determine the relevant market, the Commission applies the so-called SSNIP test. SSNIP stands for “small but significant and non-transitory increase in price”, defining the relevant market as the narrowest range of products in relation to which a text-book monopolist would be able to institute a SSNIP without experiencing a loss of sales through demand substitution that would make the price increase unprofitable.

¹⁵⁵ See AG Stix-Hackl in *Balog*, at paras 69–71.

¹⁵⁶ See AG Stix-Hackl in *Balog*, at para 71.

¹⁵⁷ Commission Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law, OJ 1997 C 327/5.

In football, it is particularly difficult to differentiate between specific markets and sub-markets. One of the most peculiar features of the football market is the enormous brand loyalty of fans. In contrast to other products such as washing powder or tooth paste, where a small increase in price may induce a customer to buy another brand, a football supporter will not switch allegiances if his club puts ticket prices up, even where there was another team situated in the same area. Besides, the different markets are closely interlinked, which, in connection with the lack of empirical evidence, makes the definition of the relevant market even more complicated. The biggest difference to other markets, however, stems from the fact that there is no such thing as a homogenous product football, but that each football game is a unique product which arguably constitutes a market on its own.

6.3.1. Football vs. Other Sports

Before analysing the various markets and sub-markets existing in a particular sport such as football, it is necessary to determine whether there actually is a separate demand for the sport in question, or whether the market in fact includes all sports. Leaving aside the question of what differentiation can be made within the football market, there can be no doubt that football cannot be substituted with other sports from a consumer's point of view. For example, it can be assumed that a football fan would not switch to cricket, following a small increase in ticket prices, the same way a subscriber to Sky Television would not cancel his football package after a SSNIP in order to watch rugby. It has already been established that football is a natural monopoly, meaning that there is no satisfactory substitute for supporters. Despite the fact that there may be a few consumers who are interested in sport as such and would probably be happy to follow another sport, if they thought football was becoming too expensive, for most fans the only alternative to football is no football. This is underlined by the importance that football and in particular a certain club has in many supporters' lives. People who travel up and down the country each Saturday to see their team play, who follow the games on television and who buy the new away strip every second season, do not suddenly develop an interest in rugby, cricket or any other sport. However, the same applies to consumers who do not have "their" team, but simply enjoy football as such. For football supporters, the television

coverage of Formula one or Tennis is not a satisfactory alternative¹⁵⁸, which is an indication that the football market is independent from other sports.

When trying to define the relevant market at issue, though, it becomes evident that it is in fact not possible to refer to “the football market”, but that there are different sub-markets within the football “industry”¹⁵⁹. These different markets are all connected with each other and restrictions on an upstream market may affect the downstream markets; however, for the purpose of competition law it is necessary to differentiate between them¹⁶⁰.

6.3.2. The Market for Football Contests

This is the market where the actual good is produced: a football match between two teams¹⁶¹. As already explained, the market for team sports requires the competitors, the two teams involved in the sporting contest, to work together in order to produce a marketable good. However, although there are certain games that would undoubtedly attract a lot of consumer interest even if they were played independently from an ongoing competition¹⁶², football matches are usually organised as part of a league or tournament.

When the organisation of professional football in Europe is analysed, it emerges that there are three levels of competition: domestic club football, international club football and international football between different nations, each of which is further subdivided into different competitions. In domestic club football there are the different divisions of the league on one hand and the cup (in some countries such as England and Scotland there are even two cups a year) on the other. In contrast to American team sports, football leagues in Europe work with a system of relegation and promotion, which means that the various divisions are interlinked

¹⁵⁸ See for example the Commission Decision 2000/400 *Eurovision*, OJ 2000 L 151/18, at para 42, where it was established that for at least the football World Cup, viewing behaviour was not influenced by the transmission of the Olympics or the Wimbledon finals.

¹⁵⁹ See “The Balance between the Game and the Money”, Study commissioned by the Netherland’s Ministry of Health, Welfare and Sport (Sports Directorate), Appendix in Caiger, A. & Gardiner, S. (eds), *op. cit. supra note 20*, p.312.

¹⁶⁰ See AG Stix-Hackl in *Balog*, at para 76.

¹⁶¹ See also AG Stix-Hackl in *Balog*, at para 78.

¹⁶² Examples are the Old Firm derby or the annual “friendly” between Scotland and England, which was abandoned in 1989. Owing to the history and nature of those pairings, the games would be marketable even if they were held outwith a league or an international tournament.

to a certain extent. Furthermore, in European club football there are also international competitions taking place in addition to the national leagues, the Champions League, the UEFA Cup and the Super Cup, which consists of only a single game, played between the winner of the Champions League and the winner of the UEFA Cup¹⁶³. It is important to note that the different sporting competitions are connected, as one team may participate in several competitions at the same time and the same players play football on different levels, with their club and also on an international level. Moreover, teams that have been competing in the first division in one year may be in the second division the year after. Similarly, the competitors in international football change from one year/event to the other, depending on whether a club or nation has managed to qualify.

In contrast to other markets where undertakings work independently on the production level and only compete when it comes to selling the product to the consumers, in football, sporting competition is a prerequisite for the production of a marketable good, which is then exploited economically by the clubs or the association. Hence, the contest market is characterised by sporting and not economic competition between teams, which means that it does not in fact constitute a market for the purpose of competition law, but merely is the place where the good is produced. As previously mentioned, the quality of the product football depends on the sporting balance between the competitors. Additionally, the attraction of the sporting contest will also vary according to the sporting quality of the teams involved. Thus, an unequal game between two Premier League clubs may generate more interest from a supporter's point of view than an evenly balanced match between two sides from the third division.

The product football can be marketed in various ways. Football can be sold in the form of broadcasting rights or through the sale of tickets to the stadium. Additionally, teams engage in the marketing of merchandise, conclude sponsoring agreements and even sell advertising space for their stadiums. To make things even more complicated, it is debatable whether each of these forms of exploitation

¹⁶³ For the sake of completeness it should be noted that there are also fairly unimportant competitions such as the Intertoto Cup, the winner of which will be granted a place in the UEFA Cup or domestic competitions on a lower league level which from an economic point of view only play a minor role in football.

actually form an individual market, or whether they are interchangeable. It has always been a heavily discussed subject, for example, whether for a fan, the experience of following a football match in the stadium can be substituted for watching a live game on television. Despite the fact that a lot of supporters still go to see their team in the stadium even if the game is transmitted on television, clubs have often argued that the extensive coverage of football on television has a negative influence on stadium attendances. Taking into account that the football experience of watching a game at home will be completely different from being part of a noisy crowd in the stadium, it would seem that there is no substitutability between live football and television coverage for a football fan. However, considering the incessantly growing ticket prices particularly in Britain, it can only be assumed that there will come a point where fans are not prepared to pay inflated prices any more and decide to follow the game at home.

Once it has been established that football can be marketed in different ways, it becomes clear that the relevant product market will vary between the methods of exploitation, depending on the preferences of the participants in each market. Whereas from a company's point of view, sponsoring rights for Celtic or Rangers might be interchangeable, the average Celtic fan would rather give up football than purchasing a Rangers season ticket, even if Celtic's was significantly more expensive. Thus, the next step is to analyse the different exploitation markets, trying to define existing sub-markets according to demand substitutability.

6.3.3. Market for Broadcasting Rights

In recent years, the market for broadcasting rights has become more and more important from an economic point of view¹⁶⁴. For broadcasters, football rights form a market separate from other sports broadcasting rights, owing to the fact that football is very popular with viewers and there is little substitutability with other sports¹⁶⁵. Especially Pay-TV and Pay-per-view broadcasters are willing to pay substantial sums for sports rights, as sport is the main drive for new viewers to subscribe.

¹⁶⁴ According to 2005 Annual Report of Football Finance by Deloitte & Touche, broadcasting remains the largest revenue source for Premiership clubs in 2003/04 at 45% of total revenue.

¹⁶⁵ See Commission Decision 2003/778 *Joint Selling of the Commercial Rights of the UEFA Champions League*", OJ 2003 L 291/25, at para 77.

However, in many leagues within Europe, broadcasting rights are sold collectively by the national association or the league itself. In this case, the market in football broadcasting rights constitutes a suppliers' market whereby the producers - the individual clubs - form a cartel which has monopoly status. The practice of collective marketing of broadcasting rights has recently been accepted by the Commission which, albeit considering a joint selling agreement of the commercial rights of the UEFA Champions League as restricting competition, has granted UEFA an exemption under Article 81(3) of the Treaty¹⁶⁶.

Without going into too much detail, it is important to note that the football broadcasting market is divided into sub-markets, according to the preferences of the viewers. First of all, it can be assumed that from a consumer's point of view there is little substitutability between premier league football and lower leagues¹⁶⁷ or between Champions League football and the less prestigious UEFA Cup. Besides, there most definitely is a separate market for international football, such as the European Championships or the World Cup, which may even be further divided, depending on the stages of a tournament (qualification, group stage, final). Apart from that, football broadcasting rights can also be distinguished according to the type of rights, as full live coverage of a sport event is a separate market from deferred transmission or coverage of extracts (highlights)¹⁶⁸ and the type of transmission, i.e. television, radio, internet.

6.3.4. The Market for Sponsoring

The sponsoring of well-known sports teams or individual sportsmen and sportswomen is an important way for businesses to raise their profile by profiting from the exposure of the sponsored party¹⁶⁹. Additionally, considering its global

¹⁶⁶ *Ibid.*

¹⁶⁷ According to market studies, English Premier League football matches do not substitute to other sport events when broadcast on the same day, see Commission Decision 2000/400 *Eurovision*, OJ 2000 L 151/18, footnote 11.

¹⁶⁸ See Temple Lang, "Media, Multimedia and EC Antitrust Law", Fordham Corporate Law Institute, Twenty-fourth Annual Conference on International Antitrust Law & Policy (1997), p. 20, available at http://ec.europa.eu/comm/competition/speeches/text/sp1997_070_en.html.

¹⁶⁹ However, sponsors may also run the risk of losing business if the sponsored party is subject to negative publicity; this has been shown by the example of Manchester United where thousands of disappointed fans have cancelled their Vodafone contracts as a sign of protest over the take-over by Malcolm Glazier; together with Manchester United's recent lack of sporting success, this might

popularity, football offers an ideal opportunity for certain brands to break into new markets and expand into other countries. In this market, it has to be distinguished between the sponsoring of particular teams¹⁷⁰ and deals which are concluded with individual players. Furthermore, there also is a market for the sponsoring of certain football events, such as the World Cup or the national premier league.

The significance of sponsoring in modern football is best illustrated by the fact that in some countries, stadiums are actually named after the sponsor, whereas in others, the sponsor even forms an integral part to the club's name¹⁷¹. In respect of the sponsoring of individuals, the immense popularity of top-class athletes is used by various companies as an important tool to promote their products and can help undertakings to achieve a market presence in countries where their brand was only little known before. Another aspect of sponsoring is agreements between sporting associations and suppliers of sporting equipment. The Commission has approved of such an exclusive sponsoring agreement involving the Danish Tennis Federation and a tennis ball supplier under the condition that such contracts are of limited duration and the selection of sponsors is transparent, open and non-discriminatory¹⁷². The economic relevance of these sponsoring agreements has just recently been demonstrated in the case of an agreement between UEFA and Adidas, guaranteeing the sports equipment company the exclusive right to supply the official ball for the European Championships 2004. According to an Adidas press release, the "Roteiro" was sold six million times in the first two weeks of the European Championships at the substantial price of € 110 apiece¹⁷³. Furthermore, Adidas has already secured the

have contributed to Vodafone's decision prematurely to cancel its sponsorship deal after the 2005/06 season, see "Vodafone steigt 2006 bei Manchester als Hauptsponsor aus", *Der Standard*, 23.11.2005.

¹⁷⁰ The most common way being shirt sponsoring, with German Bundesliga clubs generating a total of € 91.9 million, ahead of Serie A clubs (€ 64.9 million) and Premiership clubs (€ 62.5 million). Juventus Turin have the most lucrative shirt sponsorship deal with an income of € 22 million, ahead of Bayern Munich (€ 17 million), Chelsea (€ 14,5 million), Real Madrid (€ 14 million) and Manchester United (€ 13 million); source: "Teure deutsche Brüste", *Der Standard*, 20.10.2005.

¹⁷¹ The examples of Greuter Fürth's Playmobil Stadium and the Austrian club SC Interwetten.com have already been mentioned.

¹⁷² Case IV/F-1/33.055 *Danish Tennis Federation*, OJ 1996 C 138/6, see Commission press release IP/98/355, "The Commission conditionally approves sponsorship contracts between the Danish Tennis Federation and its tennis ball suppliers", 15.5.1998.

¹⁷³ See Szemeliker, L. "Ein wirtschaftlicher EM Sieger steht bereits fest: Adidas", *Der Standard*, 26/27.6.2004.

right to provide the official ball for the World Cup in its home country 2006 and the European Championships 2008 in Austria and Switzerland.

6.3.5. The Market for Merchandise

Nowadays, the selling of club merchandise such as the team kit, training gear or underwear with an imprinted logo of the club is a very important source of income for teams worldwide. Supporters around Europe spend billions each year on merchandise in order to support their club, a fact that has been recognised and exploited by the clubs. Furthermore, clubs are more and more aware of the fact that the signing of a popular player will increase sales in club merchandise, with the result that a growing number of Asian players are finding their way into European clubs which endeavour to conquer new markets. For example, when Crystal Palace signed the Chinese players Fan Zhiyi and Sun Jihai in 1998, over 100 million people tuned in to watch their Nationwide First Division games transmitted live to the Far East¹⁷⁴. Three years later, Dundee FC bought Fan Zhiyi and shortly after the club was represented at Asia's biggest football exhibition in Shanghai, selling over 600 replica kits in just a few days and receiving 40,000 entries on their newly established Mandarin website¹⁷⁵.

The importance of the market for merchandise in modern football is illustrated by the fact that some clubs are even prepared to sacrifice sporting interests for economic considerations. When Real took their team of football superstars on a three week tour through South-East Asia before the start of the 2003/04 season, which, considering the travelling involved is arguably not the best way to prepare for the start of a new season, they were criticised not only by fans, but also by the players¹⁷⁶. The example shows the extent to which economic considerations influence what should normally be a sporting decision and the lengths to which clubs are prepared to go in order to increase profits from merchandise. Thus, some clubs such as Real Madrid or Manchester United have succeeded in establishing their

¹⁷⁴ "Premiership trio seek Asian Cup fortune", www.soccernet.com, 23.7.2003.

¹⁷⁵ McCabe, A., "You'll never wok alone", *Daily Record*, 25.5.2002.

¹⁷⁶ In particular Zinedine Zidane disapproved of Real Madrid's Asia tour, which involved four matches in five days, criticising that "after each match, we went to bed late, we got up early and headed for the airport. In these conditions, it was impossible to do real pre-season training. It was more a matter of recuperation", see "Zidane slams Asia tour", *The Daily Star*, 20.8.2003.

brands in countries where most people buying their team kit would struggle to explain even basic rules of the game of football.

The need for legal control on the market for merchandise has also been demonstrated by the already mentioned case of price-fixing of football replica shirts in England¹⁷⁷. The danger of market distortion in the market for football merchandise is enhanced by the extraordinary brand loyalty of football supporters. An AC Milan fan is interested only in his team's shirt and is not going to buy an Inter kit instead, even if the club has put up prices. Furthermore, in contrast to other consumers who are not particularly interested in the economic welfare of their preferred retailer, football fans buy merchandise in order to support the club and make more funds available for the team. This means that those consumers are particularly vulnerable when it comes to distorting practices of the clubs, as they can neither switch to another alternative, nor do they want to boycott the club, as this would weaken its sporting success.

6.3.6. The Market for Stadium Advertising

Despite the fact that compared to the other exploitation markets, the market for stadium advertising is of minor importance, it should still be mentioned for completeness' sake. Owing to the growing number of televised games, stadium advertising is of interest not only for local advertisers, but also for companies operating nation-wide. Moreover, taking into account that European games are shown throughout the Union, the geographical market for stadium advertising may even comprise more than one country. During the 2004 European Championships, for example, viewers in and outside Europe were subjected to stadium advertising by international companies such as McDonalds, Coca-Cola or Mastercard. Evidently, in the case of the World Cup, which is broadcast all over the globe, the geographical market for stadium advertising becomes even wider. It is important to note, though, that the product market for stadium advertising may be divided, depending on the nature of football competition, like the league division a club participates in or the attractiveness of a tournament from the viewers' point of view.

¹⁷⁷ Decision of the OFT No. CA98/06/2003 from 1.8.2003.

6.3.7. The Market for Match Tickets

The market for tickets to a football match falls between the exploitation and the contest market, as the selling of match tickets is not only a method of marketing, but also an essential component of organising the competition. It is very difficult to define the relevant product market, as arguably each game may constitute a separate market, depending on the opponents. For example, for an Arsenal fan, a ticket to an Arsenal game is not substitutable with a ticket to a match involving two other teams. Furthermore, it is evident that for the same supporter, to watch Arsenal vs. Charlton is not a satisfying alternative to a match between the Gunners and arch rivals Tottenham. Even for a football fan who does not have allegiances to a certain club, different matches are not necessarily interchangeable, as any neutral football lover would prefer to see an Old Firm game rather than a match between Dunfermline and Livingston. The difficulties involved in determining fan preferences regarding different football matches have already been touched upon in the context of the market for broadcasting rights. Moreover, it has already been mentioned that the sale of match tickets may be influenced by the fact that a game is transmitted live on television. Evidently, empirical evidence would be needed to establish exactly the relevant product markets.

Concerning international football competitions, the Commission, referring to the unique nature of the World Cup, has considered entry tickets to the World Cup finals to form a separate product market from the ticket market for any other football competition¹⁷⁸. Similarly, it may be assumed that tickets for the European Championships, the UEFA Champions League and the UEFA Cup constitute separate markets, which might be further divided according to the different stages of the relevant competition.

As regards the geographic market for football tickets, it is submitted that the market for domestic competitions is national, owing to fan interests and travelling distances. In view of the widespread demand for tickets throughout the EEA, the geographic market for World Cup tickets was considered to comprise at least all

¹⁷⁸ Decision 2000/12 *1998 Football World Cup*, OJ 2000 L 5/64, at para 68.

countries within the EEA¹⁷⁹, which equally applies to the European Championships. In contrast, the geographic market for entry tickets to international club competitions, with maybe the exception of the finals, will depend on the opponents involved.

6.3.8. The Market for Players

It is evident that in order to produce a football game, one needs first and foremost players. Although there are many other people part of a club, i.e. the manager, the coaches, the physiotherapists, the groundsmen, etc., the players constitute the most important production factors for producing the good – the sporting contest. However, there have been objections to the fact that human beings who do not qualify as undertakings themselves may be assumed to form a market for the purpose of EC competition law¹⁸⁰. As pointed out by Advocate-General Stix-Hackl in her opinion to the *Balog* case, though, the significance of the production factor (human beings) has not only been recognised in connection with football, but also plays an important role in the service sector¹⁸¹. Furthermore, the Court has already recognised that human labour too can be the subject of economic activity¹⁸². Thus, the market in football players constitutes a market in sources of supply, upstream of the market where the sporting contest is produced. On this market each club tries to buy the best possible players for the available funds, however, the fact that clubs both buy and sell players at the same time, means that clubs have to be careful about letting players move to clubs which stand in direct sporting competition to them.

When the structure of the market for football players is analysed, one may wonder to what extent professional footballers are interchangeable from the clubs' point of view. In this context players have been compared to artists, whose talents and performances are so individual that they are generally not substitutable against each other¹⁸³. However, despite the fact that players have different skills and playing styles, the demand for footballers is not so narrow that if a club is unable to purchase

¹⁷⁹ *Ibid*, at para 77.

¹⁸⁰ See the submission of FIFA in *Balog*, opinion AG Stix-Hackl, at para 73.

¹⁸¹ AG Stix-Hackl in *Balog*, at para 85.

¹⁸² See Case C-41/90 *Klaus Höfner and Fritz Elser v. Macrotron* [1991] ECR I-1979, at para 21.

¹⁸³ See the submission of the Italian Government in *Balog*, opinion AG Stix-Hackl, at para 89.

a particular player, it will not engage another one¹⁸⁴. In general, whenever a club is looking to buy a new player, there will be an understanding between board and manager as to which position needs to be strengthened and how much money is available. Apart from price and position, what clubs are generally only interested in when buying a new player is the question whether he is actually any good, which will usually be reflected in the transfer fee. Hence, if a particular player is not available, the club will simply engage another one who meets the required criteria. Considering that, it is necessary to outline whether the market for football players is further divided according to market value and position of players.

6.3.8.1. Quality/Market Value

At the beginning of the 2004/05 season Real Madrid were looking to buy yet another forward to strengthen their already impressive strike force. Evidently, Real did not consider engaging a lower-league player, but wanted another famous high-quality footballer, which led to the signing of Liverpool's Michael Owen. This example shows that in some cases there is in fact only limited substitutability between football players, as for Real Madrid, only a striker of international pedigree would have fitted the bill. On the other hand, when Rapid Wien planned to buy a new forward, they certainly did not consider joining the race for Wayne Rooney. Even in those cases where a high-quality player moves at the end of his contract, the chances for a small club to engage such a player are very low, considering the high wage demands and signing-on fees. Thus, it could be argued that there are separate markets for expensive, high-quality footballers and cheaper, less prolific players. However, while small clubs with limited budgets will usually not participate in the transfer of high-profile players, it is not uncommon for the big European clubs to look for new talent in the lower leagues. Despite the fact that the player in question will often not be granted a place in the first team at the beginning, there is undoubtedly evidence of interaction between the leagues, which makes it impossible to separate the market depending on market value/quality of players. This is underlined by the fact that in individual cases, some clubs, having missed out on their high-profile transfer target, have been known to go for a relatively unknown player for a smaller transfer fee.

¹⁸⁴ AG Stix-Hackl in *Balog*, at para 90.

6.3.8.2. Position

Whereas it is usually possible for a club to engage a less expensive player, it is more difficult to imagine a scenario whereby a club needs a striker and ends up employing a defender instead. Moreover, taking into account the ongoing specialisation of individual players, footballers can not only be divided into goalkeeper, defender, midfielder and striker, but there are further subdivisions. Depending on the tactics and style of play, a team will require different kinds of players with special skills. Thus, are there different markets for wingers, centre-halves, attacking/defending midfielders, etc.? Considering their playing advantage on the left wing and the fact that there is a notorious shortage of such players within the game, one could even argue that left-footed players form their own market. However, when the different kinds of players and their interchangeability within a football team are analysed, it emerges that there is only one truly specialist position in the team: the goalkeeper. Individuals playing in this position are so specialised that they cannot be used in any other function. Vice versa, it is virtually impossible to use a field-player in goal¹⁸⁵. This is underlined by the fact that they fulfil a unique purpose in the game and even train separately from the rest of the team. Although it is true that a striker needs different skills from a defender and there is usually little interchangeability between them, there are players whose game is so versatile that they can play in both positions. Furthermore, it is possible to retrain a player from being a centre-forward to playing as a defensive midfielder, but it is very rare that a field-player will suddenly be used as a goalkeeper.

6.3.8.3. Nationality

Apart from the issue whether there are separate markets for different types of players, it is further questionable whether the market is divided according to the nationality of footballers. After the *Bosman* case, nationality restrictions for EEA players have been abolished and, additionally, all EEA citizens have been given the right to move freely at the end of their contracts. Thus, from a club's point of view,

¹⁸⁵ This was cruelly experienced by Aberdeen in the 2000 Scottish Cup Final against Rangers. After their goalkeeper Jim Leighton was carried off with a broken jaw in the first few minutes of play, striker Robbie Winters had to play in goal as no substitute goalkeeper was available, and Aberdeen went on to lose 4-0.

there is no difference whether it employs a German, Spanish or Icelandic player. In respect of non-EEA players, the situation may be more difficult, depending on the individual circumstances of the player. If a non-EEA player who is at the end of his contract is moving within the EEA, for example, a club will not have to pay a transfer fee. However, nationality restrictions may still apply, a factor which may well influence the decision of a club whether a particular player should be bought. Also, under the 1997 FIFA Regulations, in the case of non-EEA players transferring from a club outside the EEA to a team within the EEA, the old club could still demand a fee from the buying club, even if the player's contract had expired. Considering the number of non-EEA footballers playing within the EU at the time, though, it seems as if the clubs did not differentiate between EEA/non-EEA players, but chose according to ability, price and position. Moreover, the number of players transferring from outside the EEA at the end of their contracts was quite small compared to the number of transfers in total and there is no evidence of a major increase now that FIFA has abolished transfer fees for out-of-contract players worldwide. Thus, there is no separate market for third country football players¹⁸⁶.

6.3.8.4. Out of Contract/Mid-Contract

Taking into account the requirement of a transfer fee for players still in contract under the 1997 FIFA Regulations, one may wonder whether there was a separate market for out-of-contract players who could move freely and thus, were less expensive for a club to acquire. As pointed out above, though, players moving “on a *Bosman*” would often be even more expensive than players still in contract with another club, owing to increased wage demands and signing-on fees. Additionally, it has already been demonstrated that for the purpose of EC competition law, players cannot be differentiated according to price, since rich clubs regularly buy cheap players.

In summary, it has to be emphasised that for the purpose of EC competition law, there is no market for football as such, but it is possible to identify several sub-markets within the football industry. The relevant market for the transfer rules is thereby the market for football players, i.e. the acquisition market, formed by the

¹⁸⁶ See also AG Stix-Hackl in *Balog*, at para 88.

supply of and demand for football players by the individual clubs. Before it is examined whether the 1997 FIFA Regulations constituted a breach of EC competition law, though, it is necessary to determine the relevant geographical market for football players.

6.3.9. Geographical Market

As a result of the abolition of nationality restrictions in European club football for EEA players, footballers are nowadays moving between clubs all over Europe and there are no indications of any major differences between national markets in countries within the EEA. Also, despite the fact that there are still nationality restrictions in place for third country players who are transferring from outside the EEA, the number of players from South America, Eastern Europe and Africa is constantly on the rise. The last few years have even witnessed the arrival of some Asian players in European football. Furthermore, in modern times, language barriers seem to become less and less important and also smaller clubs regularly recruit players from abroad. For a lot of clubs it is cheaper to engage foreigners who are already the finished article, rather than having to invest in the development of their own youth players. On the other hand, cultural differences, which can make it difficult for a player to settle in an alien country, together with the fact that players from outwith the territory governed by UEFA often have to travel significant distances at times inconvenient for the club in order to fulfil their international duties, may hold clubs back from signing non-European players. Furthermore, before the coming into force of the 2001 FIFA Regulations, clubs still had to pay a transfer fee for out-of-contract players coming from a club located outside the EEA and thus, if they had the choice presumably would have preferred to sign a player transferring from within the European Economic Area. However, taking into account the number of South American, Asian and African athletes playing in leagues throughout the EEA, it can be assumed that the geographical market for football players is global, comprising the territory of all the associations in which the FIFA transfer regulations are applied¹⁸⁷.

¹⁸⁷ See also AG Stix-Hackl in *Balog*, at para 93.

6.4. REMAINING RESTRICTIONS FOR OUT-OF-CONTRACT PLAYERS

As is commonly known, the Court's decision in the *Bosman* case only applied to transfers of out-of-contract players from EEA countries between two Member States within the EEA. Thus, when assessing the 1997 FIFA Regulations under Article 81(1) of the Treaty, it is necessary to differentiate between two possibly restrictive practices: the transfer rules regulating the movement of those out-of-contract players for whom a club could still demand a transfer fee – applicable to transfers of third country nationals, to transfers from a club outside the EEA to a club within and vice-versa, and to domestic transfers – and transfer rules concerning mid-contract transfers. However, it is important to note that non-EEA nationals moving between two associations within the EEA were eventually given equal treatment with EEA citizens from 1 April 1999, albeit five years later than initially intended¹⁸⁸.

Only a short period after the *Bosman* case, players tried to challenge the remaining requirements for transfer fees for out-of-contract players. One of the first of these cases involved the Scottish international John Collins who transferred from Celtic to AS Monaco at the end of the 1995/96 season. Despite the fact that Collins' contract had expired, Celtic requested AS Monaco to pay a transfer fee, arguing that since the principality of Monaco was not a Member State of the EEA, the *Bosman* ruling did not apply. AS Monaco on the other hand, took the view that as a member of the French football association, playing in the French first division, it should be treated in the same way as a French club and was thus covered by the provisions on the free movement of workers. The Commission, having been approached by FIFA about the issue, confirmed that the principality of Monaco was not part of the Community for the purpose of the free movement of workers. However, taking into account that AS Monaco played in the French league, the Commission considered that the *Bosman* ruling was applicable to the transfer, as it would retain "a sufficiently close link with the Community"¹⁸⁹. Thus, FIFA ruled in favour of AS

¹⁸⁸ See point 1 of FIFA Circular No 616.

¹⁸⁹ See answer to the written question E-1290/97 by Bill Miller (PSE) from 11.4.1997, OJ 1997 C 319/247; the transfer was also subject to proceedings before the Court of Arbitration for Sport, Case 98/201 *Celtic v. UEFA*, which came to the same conclusion. However, this view was by no

Monaco, arguing, “because the transfer took place between two clubs of national associations both located in EU territory [...] no compensation is due”¹⁹⁰.

Shortly after the dispute around John Collins’ transfer to AS Monaco, the scenario of a player moving from a club in a third country to a team within the EU gave rise to a complaint to the Commission. Massimo Lombardo, a Swiss national playing with Grasshoppers Zürich received an offer from the Italian club Perugia. As Grasshoppers requested a transfer fee, Perugia complained to the Commission, arguing that the requirement of a transfer fee infringed Article 81 of the Treaty. As a result of the investigation by the Commission, the football authorities were asked to propose an alternative to the existing transfer system; however, it was only when the 2001 transfer regulations came into force that all out-of-contract players were given the right to free transfer.

The cases of John Collins and Massimo Lombardo demonstrate some of the difficulties caused by the unequal treatment of transfers between two Member States and moves from within the EEA to a club located in a third country. However, fees for players whose contracts had expired were not only criticised in relation to third-country transfers, but also in the case of domestic transfers¹⁹¹. From a footballing point of view, the differentiation between domestic and third-country transfers on the one hand and trans-EEA moves on the other seemed rather arbitrary and so it was no surprise when the remaining transfer fees for out-of-contract players were finally challenged before the European Court of Justice under the competition rules.

In 1998 a request for a preliminary ruling was made by a Belgian court regarding the transfer of the Hungarian player Tibor Balog. Despite the fact that the case was eventually removed from the register after the parties agreed on an out-of-court settlement, it is worth mentioning, particularly as Advocate-General Stix-Hackl

means universally accepted, see for example Spink, P., “Post-Bosman Legal Issues”, (1997) 42(3) *Journal of the Law Society of Scotland*, p. 109, who stressed that “it seems hardly necessary to reiterate that Monaco cannot be considered part of the EC for the purposes of football, or that AS Monaco can be considered French by virtue of the league in which they play”.

¹⁹⁰ *Ibid*, p. 108.

¹⁹¹ See for example the case of Chris Honor, who, despite interest from various English lower league clubs, failed to find a new employer after his contract with the Scottish club Airdrie FC had run out at the end of the 1994/95 season, as Airdrie asked for a transfer fee of £200,000. Airdrie eventually agreed to a free transfer in 1995, by which point it was too late, as Honor had acquired a petrol station and committed himself to non-league football, see Spink, P., “Blowing the Whistle on Football’s Domestic Transfer Fee”, (1999) *Juridical Review*, p. 74.

had the chance to deliver her opinion. Mr. Balog had been playing for the Belgian club Charleroi since 1993 until the expiry of his contract in June 1997. After he had turned down the offer of a new contract and several deals with other clubs fell through owing to the substantial transfer fee requested by Charleroi, Balog was finally engaged by an Israeli club for the 1997/98 season. Since the move was limited to one season after which Balog was supposed to return to Charleroi, the Belgian club did not seek a transfer fee. In April 1998 the player asked Charleroi to acknowledge that the club did not have the right to demand a transfer fee from a possible future employer, which the club refused. After Balog did not accept another offer of a contract, he brought proceedings for interim relief in the *Charleroi Tribunal de première instance*, seeking an order requiring the club to abstain from any request for a transfer fee from a future employer. The Belgian court referred the following question to the European Court of Justice for a preliminary ruling:

“Is it compatible with Article 85 [now 81] of the Treaty of Rome and/or with Article 53 of the Agreement on the European Economic Area for a football club established in the territory of a Member State of the European Union to claim, on the basis of the rules and circulars of the national and international federations (URBSFA, UEFA, FIFA), payment of a “transfer sum” on the occasion of the engagement of one of its former players, a professional footballer of non-Community nationality who has reached the end of his contract, by a new employer established in the same Member State, in another Member State of the European Union or the European Economic Area, or in a non-member country?”¹⁹²

The question referred to the Court makes clear that the *Balog* case concerned only transfers where fees could still be demanded for players whose contracts had expired: moves (of EEA-foreigners) between clubs in different Member States, transfers to clubs outwith the territory of the EEA and domestic transfers¹⁹³. In this context, it is important to point out that the fact that Mr. Balog was not a national of an EEA Member State is irrelevant for competition law purposes, which is addressed to undertakings, i.e. the clubs or the associations. Thus, there may be differences

¹⁹² See AG Stix-Hackl in *Balog*, at para 18.

¹⁹³ The question whether the only other scenario where the former club could demand a transfer fee for out-of-contract players - a player moving from a club outside the EEA to a club situated in a Member State - would have been in breach of Article 81, will be examined below.

between the treatment of transfers of out-of-contract players depending on the location of the clubs involved in a transfer, but not according to the nationality of the player concerned.

6.4.1. Restriction of Competition

When the anticompetitive effects of an agreement between undertakings are analysed, it is necessary to compare the market situation including the interferences with competition, with a scenario without those interferences¹⁹⁴. The market in footballers was affected by the 1997 FIFA regulations in so far as, without the requirement of transfer fees for certain out-of-contract players, all players could have moved freely at the end of their contracts and clubs would have been able to engage any player without having to pay a transfer sum. Thus, in respect of the out-of-contract players at issue, the transfer system reduced the choice of players available to the clubs and the teams were restricted in their competition to recruit players. The transfer rules replaced the free play of the market forces of supply and demand by a uniform machinery within FIFA, in so far as it qualified as a sharing of sources of supply within the meaning of Article 81(1)(c) of the Treaty¹⁹⁵. Contrary to the argument put forward by the football authorities in *Balog*, as well as *Bosman*, the transfer rules were not neutral with respect to competition, but actually contributed to the preservation of the existing competition situation, which is underlined by the fact that the fees could be demanded even though the player in question was out of contract¹⁹⁶.

As a further argument against the transfer system at issue, Advocate-General Stix-Hackl submitted that the requirement of transfer fees for out-of-contract players kept players' wages at a lower level¹⁹⁷. Despite the fact that the development post-*Bosman* undoubtedly witnessed a substantial increase in players' income, it should be stressed that such considerations are irrelevant under Article 81 of the Treaty, as

¹⁹⁴ See AG Stix-Hackl in *Balog*, at para 101, citing *Société Technique Minière*, at p. 250.

¹⁹⁵ See AG Stix-Hackl in *Balog*, at para 98.

¹⁹⁶ See AG Stix-Hackl in *Balog*, at para 100; AG Lenz in *Bosman*, at para 262.

¹⁹⁷ See AG Stix-Hackl in *Balog*, at para 103.

footballers generally do not qualify as undertakings and the competition which is restricted by the transfer rules is that between clubs¹⁹⁸.

6.4.1.1. Justification under the “Rule of Reason”?

It has already been explained that under the Court’s case law at the time the transfer rules (which arguably did not have the object of restricting competition as such) would have fallen outside the scope of Article 81(1), provided they were necessary to ensure the functioning of sporting competition¹⁹⁹. However, as mentioned above, in *Bosman* the Court held that the transfer system at issue was not only unsuitable to achieve a competitive balance, but less restrictive means such as re-distribution measures were available. Taking into account that both the transfer rules at issue in *Bosman* and *Balog* concerned transfer fees for out-of-contract players, it is evident that the Court’s considerations in *Bosman* may also be applied to the transfer rules in *Balog*. Additionally, it is very difficult to argue that the remaining transfer fees for players whose contracts have expired were necessary for the proper functioning of football, after such fees had already been abolished for the vast majority of transfers. If European football could work without transfer fees for out-of-contract players moving between two Member States, it is clear that transfer fees for transfers to and from third countries or within one Member State were not essential for the existence of football competition either.

6.4.1.2. Appreciable Effect

Agreements between undertakings fall within the scope of Article 81(1) of the Treaty only if they restrict or distort competition within the common market to an appreciable extent²⁰⁰. However, according to the Court, potential effects suffice²⁰¹, when foreseeable with a sufficient degree of probability of appreciable adverse effects²⁰². When analysing whether an agreement causes appreciable interferences within the common market, the Court usually assesses the market structure and

¹⁹⁸ See also AG Lenz in *Bosman*, at para 263.

¹⁹⁹ As *Wouters* was decided after *Balog*, the judgment is not relevant in this context.

²⁰⁰ See for example *Société Technique Minière*, p. 250 ; Case 5/69 *Völk v. Vervaecke* [1969] ECR 295.

²⁰¹ Case C-19/77 *Miller International Schallplatten GmbH v. Commission* [1978] ECR 131, at para 15.

²⁰² Case 99/79 *Lancôme v. Etos* [1980] ECR 2522, at para 23.

market shares of the undertakings involved and the quantitative effects of the agreement on competition within the common market. Having said that, the threshold of appreciability is very low²⁰³. In the case of the football transfer rules, the fact that the agreement involves all the undertakings acting on the market suggests that competition is affected to an appreciable extent. Furthermore, although transfers to which the requirement of a transfer fee for out-of-contract players still applied at the time constituted a fairly small part of the overall transfer activity, the significant number of third-country nationals playing within the European Union implies that competition was distorted appreciably²⁰⁴. In those cases where national associations still provided for domestic transfer fees for players whose contracts had expired, the interference had an appreciable effect at least on the market in the particular Member State; however, there have been disputes about whether domestic transfer fees affect trade between Member States.

6.4.1.3. Effect on Trade between Member States

In order for Article 81(1) to apply, an agreement between undertakings must have an effect on trade between Member States. The intention behind this requirement is to define the boundary between “the areas respectively covered by Community law and national law”²⁰⁵. Thus, a restrictive agreement, which only affects trade within a single Member State, will not be caught by Article 81(1), neither will an agreement which affects trade between a Member State and one or more non-Member States²⁰⁶. The Court has laid the threshold for an agreement to have an effect on trade between Member States fairly low in the past, holding the requirement to be satisfied when it

²⁰³ In *Miller*, a combined market share of five percent was considered enough to affect the market to an appreciable extent; the Commission has issued guidelines regarding its approach to agreements of minor importance, see *Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 81(1)* (de minimis) OJ 2001 C 368/13, establishing that the Commission will not start proceedings in cases covered by the Notice. Agreements between undertakings whose aggregate market share does not exceed ten percent on markets where the parties are actual or potential competitors, respectively fifteen percent for cases where the parties are not competitors on the relevant markets, do not appreciably restrict competition. A five percent threshold applies to vertical cases, in which competition may be restricted by the cumulative effect of agreements; however, individual suppliers or distributors with a market share not exceeding five percent are generally not considered to contribute significantly to a cumulative foreclosure effect. Apart from that, the Notice also contains a list of hardcore restrictions, in case of which it does not apply.

²⁰⁴ See also AG Stix-Hackl in *Balog*, at para 121.

²⁰⁵ *Consten & Grundig*, at p. 341.

²⁰⁶ See Lane, R., *op. cit. supra* note 40, p. 68.

is possible to “foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States”²⁰⁷. The concept of trade is interpreted broadly in EC competition law and has been held to relate to the placement of employees²⁰⁸, which means that the supply of and demand for professional football players is included²⁰⁹. Moreover, in EC competition law proof that an agreement had an actual impact on trade is not required, as long as it was capable of having that effect²¹⁰, which means that even a potential effect suffices.

Whereas it is evident that trade between Member States will be affected by transfers between two clubs located in different Member States²¹¹, there have been doubts as to whether this will be the case with regard to domestic transfers or transfers to or from a third country. A transfer system that enables a club to demand a transfer fee for an out-of-contract player moving within a Member State, affects trade between Member States in so far as clubs will obviously try to sell their out-of-contract players to a club in the same country. On the other hand, clubs looking to buy a player whose contract has expired will try to acquire a player from a club in another Member State in order to avoid having to pay a transfer fee. Thus, there have been arguments that domestic transfer rules providing for a transfer fee for out-of-contract players actually increased trade between Member States. However, according to the Court, “the fact that an agreement encourages an increase, even a large one, in the volume of trade between states is not sufficient to exclude the possibility that the agreement may ‘affect’ such trade”²¹². Thus, the decisive point is

²⁰⁷ *Société Technique Minière*, p. 249.

²⁰⁸ See Case C-55/96 *Job Centre* [1997] ECR I-7119.

²⁰⁹ See AG Stix-Hackl in *Balog*, at para 127; see also AG Alber in *Lehtonen* in respect of basketball players.

²¹⁰ *Miller*, at paras 14-15.

²¹¹ See Lenz in *Bosman*, at para 261.

²¹² *Consten & Grundig*, p. 341; see in this context Lane, R., *op. cit. supra* note 40, p. 69, who points out that in contrast to the English and French (*affecter*), which are both neutral, the Dutch (*ongunstig kunnen beïnvloeden*), the German (*beeinträchtigen geeignet sind*) and the Italian (*pregiudicare*) presuppose a negative effect on the market.

not whether trade is affected in a negative way, but whether inter-state trade flows would have developed differently in the absence of the agreement²¹³.

As far as fees regarding transfers to a third country are concerned, it can be argued that they affect trade between Member States, as clubs will prefer to sell their players to a club outwith the EEA so that they can receive a transfer fee, even though a player's contract has expired. As a result, the sources of supply are limited as fewer players are available on the Community market. The requirement of transfer fees for players moving from a third country has the effect that clubs within the Community will be reluctant to buy a player from a club located outside the Community. It is established case law that restrictive agreements between undertakings within the Community and undertakings in third countries, which reduce the supply within the European Union of products originating outside the Community, fall within the scope of Article 81(1)²¹⁴.

Apart from that, as pointed out by Advocate-General Stix-Hackl, there is an effect on trade between Member States not only regarding the market for players, but also where the economic activities of the clubs and associations on the downstream markets are the object of trade between Member States²¹⁵. Since clubs were restricted in their efforts to increase the marketability of their teams by improving their squads, the requirement for out-of-contract transfer fees evidently had an effect on inter-Community trade on other markets, such as the market for broadcasting rights or merchandise.

For an agreement to be caught by Article 81(1), trade between Member States has to be affected to an appreciable extent. When determining whether trade between Member States is affected appreciably, the correct definition of the relevant market is of utmost importance, as the volume of trade affected has to be considered in proportion to the product and geographical market in which a product competes. If the relevant market is assumed to be the market for footballers, it is noticeable that the number of transfers of players whose contracts have expired is fairly small in comparison to mid-contract transfers. Moreover, the requirement for a transfer fee

²¹³ See Schröter, H. in Schröter, H., Jakob, T & Mederer W. (eds), *Kommentar zum europäischen Wettbewerbsrecht* (Nomos Verlagsgesellschaft, Baden-Baden, 2003), p. 291.

²¹⁴ Case C-51/75 *EMI Records v. CBS United Kingdom* [1976] ECR 811.

²¹⁵ AG Stix-Hackl in *Balog*, at para 129, citing Case 123/83 *BNIC v. Clair* [1985] ECR 391, at para 29.

for out-of-contract players under the 1997 FIFA Regulations only concerned a minor part of such transfers, which, in the context of appreciability, should be further divided into domestic transfers, transfers to a club outwith the Community and transfers from a third country club²¹⁶. Considering the fairly high number of domestic transfers within the Community, there can be no doubt that transfer fees for players moving within a Member State affect trade between Member States. As already mentioned in connection with the appreciability of the interferences on competition, the fact that a large number of third country nationals are engaged by clubs within the Community implies that restrictions on transfers from third countries have an appreciable effect on inter-state trade. The least impact on trade between Member States will be made by exports of players from within the Community to a club outwith. However, as the threshold for appreciability as applied by the Commission and Court lies very low, it may be assumed that the provisions on transfers to third countries are at least capable of affecting trade between Member States to an appreciable extent²¹⁷. Evidently, empirical proof would be needed to remove any remaining doubts in this respect.

6.4.2. Exemption under Article 81(3)

Whenever an agreement or a decision by an association of undertakings falls foul of Article 81(1) of the Treaty it is void, unless it can be exempted under Article 81(3). When notification was a normal precondition for exemption²¹⁸, sporting associations had been very reluctant to notify their organisational rules, such as transfer regulations to the Commission owing to the belief that sport was outwith the scope of competition law. Considering the 2001 amendments to the transfer system, an analysis of whether the 1997 Regulations - as far as they provided for a transfer fee for certain categories of out-of-contract players - may have been eligible for an exemption, is of academic interest only, but ought to be considered briefly.

²¹⁶ See also AG Stix-Hackl in *Balog*, at paras 132-137.

²¹⁷ See also AG Stix-Hackl in *Balog*, at para 137.

²¹⁸ Owing to the already mentioned change in competition law - Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1, replacing Council Regulation No 17 of 6 February 1962, First regulation implementing Articles 85 (now 81) and 86 (now 82) of the Treaty, OJ 1962 13/204 - sports federations do not need to notify potentially restrictive measures any more and national competition authorities have been given the power to grant exemptions under Article 81(3).

For an agreement to qualify for an exemption under Article 81(3), it has to fulfil four different conditions. It is established case law that these criteria are cumulative, which means that if only one is not satisfied, the agreement cannot be exempted. Moreover, it has to be emphasised that in the past, the Court has interpreted the scope of Article 81(3) quite narrowly. In contrast, the Court of First Instance has expressed the opinion that it was possible to recognise considerations connected with the pursuit of the public interest in order to grant an exemption under Article 81(3) of the Treaty²¹⁹. Similarly, in a decision concerning the joint selling of football television rights, the Commission stated that “any need to take the specific characteristics of sport into account such as the possible need to protect weaker clubs through a cross-subsidisation of funds from the richer to the poorer clubs, or by any other means, must be considered under Article 81(3) of the Treaty”²²⁰. Taking a closer look at existing case law, it is possible to detect cases whereby the Court seems to have allowed the consideration of public interest objectives under Article 81(3). For example, the Court took account of the preservation of employment²²¹, the wide selection of print media²²² and the consumer interest²²³. In his opinion to the *Wouters* case, Advocate-General Léger has interpreted this case law in the sense that “the wording of Article 85(3) makes it possible to take account of [...] considerations connected with the pursuit of the public interest”²²⁴. However, even though the Court may have recognised public interest concerns in isolated cases, the scope of Article 81(3) should be limited to economic reasons²²⁵. First of all, the wording of Article 81(3) leaves no room for a broad interpretation and also, with regard to the *Wouters* case law, public interest considerations are better taken into account under the “rule of reason”.

²¹⁹ See Cases T-528 etc./93 *Metropole Television SA and Reti Televisive Italiane SpA and Gestelevision Telecinco SA and Antena 3 de Television v. Commission* [1996] ECR II-649, at para 118.

²²⁰ Commission Decision 2003/778 *Joint Selling of the Commercial Rights of the UEFA Champions League*, OJ 2003 L 291/25, at para 129.

²²¹ Case 42/84 *Remia BV and Verenigde Bedrijven Nutricia NV v. Commission* [1985] ECR 2545, at para 42.

²²² Case 243/83 *Binon SA & Cie v. SA Agence et messageries de la presse* [1985] ECR 2015, at para 46.

²²³ Case 26/76 *Metro SB Großmärkte v. Commission* (No 1) [1977] ECR 1875.

²²⁴ AG Léger in *Wouters*, at para 113.

²²⁵ See also Lamping, A. & Ludwigs, M., *op.cit. supra note 69*, p. 56.

Apart from the question whether Article 81(3) can be interpreted to allow public interest objectives, it has also been argued that it may include a balancing approach in the sense of the US “rule of reason” doctrine. For example, the Court of First Instance, having dismissed the existence of a “rule of reason” under Article 81(1), pointed out “it is only in the precise framework of that provision [Article 81(3)] that the pro- and anti-competitive aspects of a restriction may be weighed”²²⁶. Considering the differences between the US and the EC competition law systems and that there is no evidence for a balancing approach in the case law of the Court of Justice, such an interpretation stretches the scope of Article 81(3) too far²²⁷.

Regarding the football transfer rules at issue, it becomes clear that there is no legal base to recognise an exemption under Article 81(3) of the Treaty. Without having to examine the issue any further, it is evident that the requirement of transfer fees for a certain category of out-of-contract players neither contributes to improving the production or distribution of goods, nor promotes technical or economic progress and certainly does not allow consumers a fair share of the resulting benefit. In contrast, the transfer system hinders the “distribution” of players and the only benefit arising from the rules at issue is attributable to the high-profile clubs, becoming even richer.

6.4.3. Freedom of Association

Leaving aside the question whether the rules at issue were suitable to achieve a legitimate sporting aim and as such would have been covered by the football bodies’ freedom of association, the fact that they fell foul Article 81(1) implies that a limitation of the basic right would have been justified in order to protect the rights of others. Article 81 of the Treaty shall ensure that competition on the market works without distortions and protects the economic interests of competitors and consumers. As all the entities operating on the market, the clubs, seem to have supported the transfer system and consumer interests were arguably not affected by the restrictions on player movement, it might be possible to take the view that an

²²⁶ Case T-112/99 *Métropole Télévision (M6) and Others v. Commission* [2001] ECR II-2459, at para 74.

²²⁷ See also Lane, R., *op. cit. supra note 40*, p. 100.

interference with the basic right of association was not necessary to protect individual interests in the particular case. However, just because the majority of clubs did not object to the transfer rules this does not automatically mean that the competition rules were not necessary to guarantee the rights of individual clubs. In those cases where clubs were prevented from buying players without having to incur a transfer fee, it is evident that individual interests were being violated by the transfer regulations, interests that Article 81 is intended to protect. The question whether clubs have in fact tried to challenge the system or not is thereby immaterial. Considering that the rules at issue only applied to a small part of transfers, it is submitted that any sporting interest in such rules would have been outweighed by the clubs' interest under Article 81.

6.5. PLAYERS STILL IN CONTRACT

Apart from the issue of transfer fees for out-of-contract players in the afore mentioned cases, which only concerned a fraction of the total numbers of transfers, the main objection against the 1997 FIFA Regulations under the competition rules stemmed from the fact that the transfer regulations did not provide players still in contract with any opportunity to move to another club without the consent of their employer. What is more, FIFA Circular No 616 from 4 of June 1997 expressly stated that unilateral termination by a player was regarded as a breach of Article 12 (1) of the 1997 Regulations, so that the national association in question was entitled to refuse the international transfer certificate needed for a player to be eligible to play for another club. As commonly known, this practice was considered as an infringement of Article 81(1) of the Treaty by the Commission, which started an investigation into the transfer system soon after the Court's decision in *Bosman*. Although FIFA, after a consultation process with the Commission, has meanwhile adopted new transfer regulations, it is still worthwhile to examine on what grounds the Commission regarded the 1997 Regulations as a breach of EC competition law and whether it was justified to do so.

6.5.1. Restriction of Competition

It has already been established that the 1997 FIFA Regulations constitute an agreement between undertakings, while FIFA Circular No 616 can be classed as a decision of an association of undertakings (or as a decision of an association of associations of undertakings to be precise)²²⁸. Thus, when assessing the 1997 transfer system under the competition rules, it is necessary to establish whether the transfer regulations had the object or effect of restricting competition in the sense of Article 81(1).

Despite the fact that an agreement may be infringing Article 81(1) whether it has the object or effect of distorting competition, it is still necessary to differentiate between the two concepts when assessing an agreement under EC competition law. As previously mentioned, an agreement which has the object of distorting competition may only be exempted under Article 81(3), whereas an agreement merely having an anti-competitive effect may still fall outside the scope of Article 81(1) under the so-called “rule of reason”. In the legal assessment of the 1997 Regulations under Article 39, it has already been pointed out that different reasons for a prohibition of the unilateral termination of contracts can be identified, the most significant of which is the clubs’ interest in contract stability. Apart from that, the football bodies have always argued that the transfer system was necessary to redistribute funds from bigger to smaller clubs and to support youth development. Thus, not considering the question whether the transfer system was in fact suitable to achieve these aims, it can be established that the 1997 FIFA Regulations did not have the object as such of distorting competition²²⁹.

Examining the effect of the 1997 Regulations, it emerges that in the absence of the prohibition unilaterally to terminate employment contracts, players would have been able to leave their club mid-contract without the consent of their employer and as a result, more players would have been available on the employment market. Thus, the 1997 transfer rules limited the choice of players available to the clubs and therefore restricted competition on the market for football players in so far as they

²²⁸ See point 6.2 above.

²²⁹ In contrast see Case IV/36.583 *SETCA –FGTB/FIFA*, rejection of complaint of 28 May 2002, at para 31, where point two of FIFA Circular No 616 was considered as having the object and effect of restricting competition (“...qui a pour objet *et* pour effet...”).

consisted of sharing sources of supply within the meaning of Article 81(1)(c) of the Treaty²³⁰. Besides, the fact that players were still granted the possibility to transfer mid-contract under the condition that their present club agreed to the move, cannot change the anti-competitive effect of the transfer regulations, as such transfers were usually subject to the payment of a transfer fee. It is evident that, taking into account that in many cases the fees were so high that only a minority of clubs could afford to pay them, without the requirement of transfer fees for players still in contract, competition between clubs on the market for players would have been increased substantially. Furthermore, the transfer system replaced the regular market forces of supply and demand with a uniform mechanism which prevented clubs from engaging players, who would have been able unilaterally to terminate their contracts according to applicable national law, in order to raise the quality of their sporting performance, thereby increasing the possibility of economic success²³¹.

Having established that the 1997 FIFA Regulations had the effect of restricting competition, it should be pointed out that in theory, all contracts concerning trade impose restraints in some manner, “to bind, to restrain is of their very essence”²³². Although the vast majority of contracts will not affect trade between Member States in any case, it would still not be satisfactory if there was no possibility at all for certain agreements to escape the application of Article 81(1). This problem has already been mentioned in connection with the “rule of reason” concept, providing that restraints necessary for the establishment of a legitimate agreement and restrictive agreements *conditio sine qua non* for the very existence of competition are not affected by competition law. Thus, in context of the transfer rules at issue, it has to be established whether the 1997 FIFA Regulations were inherent to the existence of sporting competition, or whether they did go beyond what was necessary to guarantee the functioning of the market.

²³⁰ See the Commission’s point of view in Case IV/36.583 *SETCA-FGTB/FIFA*, rejection of complaint of 28 May 2002, at para 31.

²³¹ *Ibid.*

²³² *Chicago Board of Trade vs. US*, 246 US 231 (1918).

6.5.1.1. Justification under the “Rule of Reason”

As previously mentioned in connection with the application of Article 39, the security of employment contracts is of importance in any economy, but particularly so in football. Football lives from the fact that different teams are competing against each other and although the cases where a player would stay with one club for his entire career are less and less common, most fans still identify themselves with their team and would not be interested in a league where the composition of teams changed on a weekly basis.

However, it has already been established that an absolute prohibition on terminating a contract unilaterally goes beyond what is necessary to guarantee the functioning of sporting competition. For example, whereas it is arguable that football could not survive if players had the opportunity to hand in two weeks’ notice and leave for another club, it is highly unlikely that league football would cease to exist if a player who has signed a ten year contract with a club, was allowed to leave after five years. In this respect the observations made in connection with the provisions on free movement may be recalled, where it was demonstrated that the 1997 Regulations were in fact not necessary to ensure the very existence of sporting competition.

Apart from the stability of contract argument, the 1997 Regulations were also claimed to ensure sporting balance and to encourage especially smaller clubs to invest in youth policy. However, as pointed out above²³³, such considerations may only be taken into account since *Wouters*, which was issued after the 1997 Regulations had already been replaced. In any case, it has already been stated that it is doubtful whether the absolute prohibition on a player from terminating his contract before its expiry was actually suitable and/or proportionate to achieve the afore mentioned goals.

6.5.2. Effect on Trade between Member States

Since the 1997 Regulations undoubtedly affected competition appreciably, which is demonstrated by the fact that the system applied to all transfers within the European

²³³ See points 5.1.4.2 and 5.1.4.4 above.

Union and to the great majority of players, only exempting those who were entitled to a free transfer as a result of *Bosman*, the next step is to examine whether the system also had an appreciable effect on trade between Member States. In contrast to the rules concerning transfer fees for out-of-contract players, the 1997 regulations applied to players worldwide, irrespective of their nationality or the league in which they played. Thus, when the effect on trade between Member States is analysed, the system should be looked at as a whole and it is not necessary to differentiate between different transfer directions. Evidently, the general prohibition on unilaterally terminating employment contracts interfered with trade flows between the Member States, as no player under contract could leave for another club without the consent of his current employer. In the absence of such a restriction, players could have moved more easily and transfer activity within the Community market would have been increased. Moreover, taking into account the fact that even after April 1999, when all out-of-contract players moving between two clubs in different Member States were given the right to a free transfer, only a minority of players were available on the transfer market without being subject to the payment of a transfer fee, it is evident that the 1997 Regulations affected trade between Member States to an appreciable extent.

As regards a possible exception under Article 81(3), it could be argued that the 1997 Regulations were in the interest of the consumers, who generally prefer a stability of teams to a high fluctuation of players and even improved the product football by ensuring that the formation of teams could not be changed on a frequent basis. However, considering that the current transfer system is less restrictive in this respect, it is doubtful that the rules at issue were not excessive. On the other hand, those who claim that football has become a great deal less attractive since the abolition of the 1997 transfer system might disagree. Considering the question whether the regulations eliminated competition in respect of a substantial part of the player market, it could be argued that this was not the case, as clubs were free to buy out players' contracts. Although the requirement of the selling club's consent certainly restricted competition to a high extent, it cannot be denied that competition for players under contract still existed.

Concerning the footballing bodies' right to association, it is submitted that in principle, the sports bodies' interest in regulating player movement the way they consider best is protected under this basic right. However, taking into account the severity of the restriction on clubs, it appears that the sporting interest in team stability was outweighed by the clubs' interest in a more open player market. This is underlined by the fact that – as the example of the current transfer system shows – less restrictive means are available to achieve the desired end.

7. THE 1997 FIFA REGULATIONS UNDER ARTICLE 82

Generally, sporting measures are more likely to qualify as anti-competitive agreements in the sense of Article 81, rather than being caught by Article 82 of the Treaty. However, considering the organisational structure of team sports in Europe, regulatory measures issued by the monopolistic sports bodies have come more and more under scrutiny pursuant to Article 82.

It has already been established that football clubs and associations may be regarded as undertakings. When it comes to transfer rules, it is evident that the relevant market is the (global) market for football players. Thus, it is necessary to establish whether the clubs and/or the associations hold a dominant position on the player market. This question has already been assessed by Advocate-General Lenz in *Bosman*²³⁴. In this context, it was pointed out that according to case-law the term “dominant position” within the meaning of Article 86 (now Article 82) refers to a “position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers”²³⁵. Having confirmed that it is also possible for several undertakings together to occupy a dominant position, Advocate-General Lenz went on to assess whether in the context of transfer rules the position of the clubs or of the associations had to be ascertained. Since only the clubs are actively engaged on the player market, the Advocate-General took the view that the various football associations could not hold a dominant position on that market. However, Lenz went on to state that the transfer rules were not dictated by the associations, but merely faithfully reflected the wishes of the clubs. Thus, referring to the Court of First Instance’s judgment in *SIV*²³⁶, the Advocate-General thought it

²³⁴ AG Lenz in *Bosman*, at paras 279 – 286.

²³⁵ AG Lenz in *Bosman*, at para 281, citing Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461, at para 38; in principle, this definition is still applicable, see for example *Piau v. Commission*, at para 109.

²³⁶ Cases T-77/89 & T-78/89 *SIV and Others v. Commission* [1992] ECR II-1403, at paras 358 and 360.

possible that football clubs in a professional league are united by such economic links that together they may have a dominant position on the player market.

Similarly, the Court of First Instance in *Piau* held that from an economic point of view, the clubs presented themselves on the market for the services for players' agents as a collective entity vis-à-vis their competitors, their trading partners and consumers and thus held a dominant position²³⁷. As regards FIFA's role on the market, the court stated that since it constitutes an emanation of the clubs as a second-level association formed by those clubs, FIFA could be regarded as acting on behalf of the clubs. So far, the rationale behind this view seems to correspond to Advocate-General Lenz' opinion. However, somewhat confusingly, the Court of First Instance added in apparent contradiction to Lenz' approach (and the Commission's view in the case at issue), that the fact that FIFA was not an actor on the market for players' agents services did not prevent it from holding a collective dominant position on the market²³⁸. Thus, the court argued: "The fact that FIFA is not itself an economic operator that buys players' agents' services on the market in question and that its involvement stems from rule-making activity, which it has assumed the power to exercise in respect of the economic activity of players' agents, is irrelevant as regards the application of Article 82, since FIFA is the emanation of the national associations and the clubs, the actual buyers of the services of players' agents, and it therefore operates on this market through its members."

Analysing the Court of First Instance's argumentation, it is not entirely clear where the court is going. Did it intend to follow Lenz' view that it is the clubs that hold a dominant position, since they are acting on the market (and are effectively responsible for the rules adopted by FIFA); or, is FIFA itself having a dominant position, acting on the market through the clubs. Admittedly, both views are two sides of the same coin: whereas in the first case it is assumed that the clubs act on the market themselves, but on the regulatory field through FIFA, in the second case it is the other way round. This illustrates the difficulties involved when assessing sporting rules under Article 82, which stem from the fact that whereas the actual measure is adopted by the governing body, FIFA, it is the clubs that are effectively acting on the

²³⁷ *Piau v. Commission*, at para 113, citing Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others v. Commission* [2000] ECR I-1365, at para 44.

²³⁸ *Piau v. Commission*, at paras 115 – 116.

respective markets. Be that as it may, taking into account the described views in *Piau* and in Lenz' opinion in *Bosman*, it becomes clear that both are proceeding on the prerogative that (depending on the view, either on the regulatory field or on the actual market) one is acting on behalf of the other.

However, although it is true that all clubs are members of their respective national association, which is a member of FIFA, it is doubtful whether FIFA's actions necessarily reflect the clubs' wishes. This is underlined by the fact that the international associations generally have the overall sporting interest in mind, whereas the clubs are concentrating on their own benefit. Also, in some cases such as the already mentioned rules on the release of players for international duty, FIFA follows an objective, which is in direct conflict with the clubs' interests. Considering this, it is submitted that rather than trying artificially to construe a model whereby clubs are held to be responsible for measures adopted by the regulatory body (or the regulatory body for the clubs' actions on the market), it is necessary to separate FIFA's regulatory activity from the clubs' market activity. Hence, it emerges that as far as transfer rules are concerned, in contrast to the view adopted in *Piau* that the clubs and associations "appear to be linked in the long term as to their conduct by rules that they accept"²³⁹, clubs do actually have no choice but to adhere to FIFA's rules, which from the clubs' point of view constitute "legislation" akin to national laws. This means that clubs are actually not able to abuse a possible dominant position, since such an abuse presupposes that clubs actually have a choice as regards their activity on the market. On the other hand, as pointed out by Lenz in *Bosman* and the Commission in *Piau*, for FIFA it is impossible to hold a dominant position on a market on which it is not economically active. The court's view that FIFA is acting on the market through its members, the clubs, is therefore not acceptable as the clubs are acting independently on the market for players or on the market for players' agents services. The mere fact that they are (indirectly) members of FIFA cannot change that.

Again it emerges that EC competition law lacks the necessary instruments to deal with the special case of sport, where private bodies lay down rules regulating economic activities connected to that sport. This becomes particularly evident when

²³⁹ *Piau v. Commission*, at para 114.

the recent case concerning FIFA's rules on the release of players for international duty is considered. Considering that the international football bodies generate substantial profits by staging international tournaments²⁴⁰, it seems highly unfair that clubs should not be compensated for injuries their players have incurred whilst on international duty²⁴¹. Thus, it is evident that FIFA uses its status as regulatory body to maximise its profits generated through economic activity. However, considering that FIFA is abusing its regulatory power and not its market power as the sole organiser of worldwide football tournaments, Article 82 does not seem applicable.

Returning to the issue of transfer rules, according to Advocate-General Lenz such measures do not concern the clubs' market power against competitors, customers or consumers, but affect only the relationship between clubs and players. Thus, an abuse of a dominant position could not be established. Taking into account that clubs are the only buyers and sellers on the player market, it is evident that there are no other participants on this market. Also, consumers are not affected by restrictions on the market for football players. Hence, apart from the fact that clubs cannot be held responsible for the transfer rules, it is impossible for clubs to abuse a dominant position on a market where they are the only participants.

²⁴⁰ Bosman lawyer Jean Luis Dupont who is representing SC Charleroi claims that the World Cup brings FIFA a profit of € 2.5 billion, see Kahl, H, "Fall Charleroi: Das Gespenst eines neuen Bosman-Urteils vor der Fußball-WM", available at www.rsw.beck.de.

²⁴¹ For example, in September 2005, Zinedine Zidane incurred an injury whilst playing for France in a World Cup Qualification game against Ireland and was unable to play for one month. As a result Real Madrid lost € 2 million ("Zizou" costs Real € 70,000 a day), for which they never received any compensation.

8. THE 2001 AND 2005 FIFA TRANSFER REGULATIONS

8.1. THE PATH TO THE 2001 COMPROMISE BETWEEN FIFA AND COMMISSION

For many members of the footballing world, unsurprising as it may have been from a legal perspective, the *Bosman* judgment came as a shock, not knowing that from their point of view, matters would only go from bad to worse. Soon after national and international associations, as well as clubs and fans throughout Europe had finally come to terms with the changes caused by the Court's decision, the Commission, far from considering the conclusion of the 1997 transfer regulations as an ending point to its proceedings concerning the football transfer system, decided to continue the investigations, making the issue of long-term contracts the main focus point. After a number of disputed high-profile transfers¹, the European Commission threatened to open legal proceedings against FIFA if the transfer system was not amended shortly. This marked the beginning of a long and complicated negotiation process between the football authorities and the Community which lasted until 5 March 2001, the day the new transfer system was agreed upon.

Apart from the fact that FIFA only reacted very slowly to the Commission's call for an amended transfer system, the emerging rift between the "football family", FIFA, UEFA and FIFPro, the European players' union, rendered negotiations particularly difficult². Moreover, political intervention, sometimes at the highest

¹ Namely Ronaldo's transfer from Barcelona to Inter in summer 1997 and Nicolas Anelka's move from Arsenal to Real Madrid which was overshadowed by Anelka's threat that he would challenge the transfer rules under English contract law if Arsenal did not release him; for a closer discussion on the issue see Caiger, A. & O'Leary, J., "The End of the Affair: The Anelka Doctrine – The Problem of Contract Stability in English Professional Football" in Caiger, A. and Gardiner, S. (eds), *Professional Sport in the EU: Regulation and Re-regulation* (T.M.C. Asser Press, The Hague, 2000), pp. 197-215.

² See Conn, D., "Big Stick Ready as 'the Football Family' Squabbles", *The Independent*, 2.11.2000; in particular, FIFA president Blatter's suggestion that players disagreeing with their manager's tactics should be allowed to leave after giving two months' notice outraged UEFA officials.

level, did not make things easier³. However, finally, a compromise was reached in March 2001 after several years of negotiations. Although the player's Union was unhappy with the compromise and started legal proceedings before the Court of First Instance⁴, the new transfer rules were adopted on 5 July 2001. Subsequently, FIFpro settled with FIFA, securing its representation on the new Dispute Resolution Chamber⁵. Following the adoption of the new transfer system, the Commission officially closed its investigations, rejecting two complaints which focused on the provision set out in the 1997 Regulations hindering players from terminating contracts prematurely⁶.

FIFA has meanwhile revised the 2001 transfer regulations and put a new regime in place which came into force on 1 July 2005⁷. The current system widely corresponds to the regulations adopted in 2001, but has ironed out a few irregularities contained in the preceding system. The 2005 system is outlined below; where the 2001 Regulations differed from the current transfer rules, the relevant changes are highlighted.

8.2. 2001 AND 2005 REGULATIONS – KEY POINTS

Player Registration

▪ Transfer Windows⁸

Transfers are limited to two registration periods per year, set by the respective national association. After criticism regarding the fact that unemployed players

³ For example, the fact that Tony Blair and Gerhard Schröder found time in their busy schedules to issue a joint press release, hoping that “the Commission will take into account the special situation that exists in professional soccer” suggests that some might have preferred a political solution, see Press Release No 425/00 of the German Government, 10.9.2000, available at www.eng.bundesregierung.de/top/dokumente/pressemitteilung/ix_17866.htm.

⁴ Collet, M., “Players and officials divided over transfers”, www.soccernet.com, news, 17.2.2001.

⁵ See “Players’ group settles with FIFA over transfer plan”, www.soccernet.com, news, 31.8.2001.

⁶ See Commission press release IP/02/824, “Commission closes investigation into FIFA regulations on international football transfers”, 5.6.2002; the rejection letter of the Commission to the complainants SETCA-FBTG (Syndicat des employés, techniciens et cadres de la Fédération Générale des travailleurs de Belgique) and Sports et Libertés of 28.5.2002 is available on the European Commission’s website.

⁷ Decision of the FIFA Executive Committee of 18/19 December 2004.

⁸ Article 6 of the 2005 Regulations; see also Article 2 of the Regulations governing the Application of the Regulations for the Status and Transfer of Players, hereinafter referred to as 2001 Application Regulations.

were forced to wait until the next transfer window before they could sign for a new club, the 2005 Regulations now provide for an exception for such players.

The first transfer window normally lasts from the end of the season until the start of the new season. Under the 2005 system, the maximum permissible duration of the first transfer period has been extended from six to eight weeks.

The second transfer window opens approximately in the middle of the season and should last for no longer than four weeks. The original limitation on registrations for strictly sport related reasons has now been abandoned. More significantly, the restriction that a player may only be transferred once in a single season⁹ has been loosened and players may now be registered for a maximum of three clubs during one season, albeit only being eligible to play in official matches for two of them¹⁰.

Protection of Minors

▪ Restrictions on Transfers of Minors

The 2001 Regulations permitted transfers of minors under the condition that (a) the family of the player moved for reasons not related to football or (b) in the case of transfers within the EEA, the new club guaranteed suitable arrangements for their sports training and academic education¹¹. For this purpose, it was planned to establish and enforce a code of conduct¹². Additionally, the 2001 transfer system generally prohibited international transfers of non-EEA players under the age of 18 to a club within the EEA, unless the player moved for reasons not linked to football¹³.

The rules on the protection of minors have been simplified and are now condensed in one Article; the reference to the code of conduct has been replaced by actual standards. According to Article 19(1) of the 2005 Regulations,

⁹ Article 5(2) of the FIFA Regulations for the Status and Transfer of Players of 5 March 2001, hereinafter referred to as 2001 Regulations.

¹⁰ Article 5(3) of the 2005 Regulations.

¹¹ Article 12 of the 2001 Regulations.

¹² Article 3 of the 2001 Application Regulations.

¹³ Article 4(1) of the 2001 Application Regulations in combination with Article 12(1)(a) of the 2001 Regulations; this contradicts the provision mentioned earlier that minors were allowed to move within the EEA if clubs cared for their training and education; outside the EEA, transfers of minors not moving for family reasons were prohibited irrespective of a player's nationality, see Article 4(2) of the 2001 Application Regulations.

international transfers of players under the age of 18 are only permitted if one of the following conditions is satisfied¹⁴:

- (a) the player's parents are moving for reasons not linked to football;
- (b) the transfer takes place within the EEA and the player is aged between 16 and 18. In this case, the new club must fulfil the following minimum obligations:
 - (i) it shall provide the player with an adequate football education and/or training in line with the highest national standards, (ii) it shall guarantee the player an academic and/or school and/or vocational education and/or training, in addition to his football education and/or training, which will allow the player to pursue a career other than football should he cease playing professional football, (iii) it shall make all necessary arrangements to ensure that the player is looked after in the best possible way (optimum living standards with a guest family or in club accommodation, appointment of a mentor at the club etc.) and (iv) it shall on registration of such player, provide the relevant association with proof that it is complying with the aforementioned obligations.
- (c) the player lives no further than 50km from a national border, and the club for which the player wishes to be registered in the neighbouring association is also within 50km of that border. In such cases, the player must continue to live at home.

■ Maximum Duration of Contracts

Players under the age of 18 may only sign contracts for a duration of up to three years¹⁵.

Training Compensation for Young Players

Training compensation shall be payable as a general rule until the end of the season of a player's 23rd birthday for training incurred up to the age of 21, unless it is evident that the player has already completed his training before the age of 23¹⁶. In this case, training compensation shall be based on the years between 12 and the completion of training. However, compensation for training is not due for transfers

¹⁴ Article 19(2) of the 2005 Regulations.

¹⁵ Article 18(2) of the 2005 Regulations; see also Article 35 of the 2001 Regulations.

¹⁶ Article 1 of Annex 4 to the 2005 Regulations; see also Article 13 of the 2001 Regulations.

of amateurs or from professional to amateur status, if a club has unilaterally terminated a player's contract without just cause and if a player is transferred to a category four club¹⁷.

When a player is registering as professional for the first time, the new club must pay training compensation to every club for which the player was registered from the age of 12 and which has contributed to his training based on the actual period of training. In the case of subsequent transfers, training compensation will only be paid to the club a player is leaving¹⁸.

▪ Calculation¹⁹:

In order to calculate the compensation for training and education costs, clubs are divided into four categories²⁰. The training costs per category are calculated by multiplying the amount needed to train one player²¹ by an average player factor, which is the ratio between the number of players who need to be trained to produce one professional player²².

As a general rule, training compensation is calculated on the basis of the costs which the new club would have incurred, had it trained the player itself²³. Thus, compensation is calculated by taking the training costs of the new club multiplied

¹⁷ Article 2 of Annex 4 to the 2005 Regulations; see also Point 3 of the Annex to the Principles for Amendment in connection with Article 7(4)(c) of the 2001 Application Regulations.

¹⁸ Article 3 of Annex 4 to the 2005 Regulations; in contrast see Article 5(4) of the 2001 Application Regulations, according to which in case of subsequent transfers a certain percentage of the training compensation was distributed among all the training clubs.

¹⁹ Training compensation is regulated by Annex 4 to the 2005 Regulations; in respect of the 2001 system, Articles 16-18 of the 2001 Regulations provided that training compensation was to be calculated as set out in the 2001 Application Regulations.

²⁰ Article 4 of Annex 4 to the 2005 Regulations provides that the national associations are to divide their clubs into a maximum of four categories in accordance with the clubs' financial investment in training players; similar Article 6(4) of the 2001 Application Regulations in respect of national associations in the EEA; in respect of other national associations, Article 6(2) categorised clubs depending on their position in the national league system and the national association to which they belonged, albeit leaving it open to the national association to suggest otherwise.

²¹ These costs are established by FIFA and are published on www.fifa.com; in UEFA's jurisdiction the training costs for a category 1 club are € 90,000, for a category 2 club € 60,000, for a category 3 club € 30,000 and for a category 4 club € 10,000.

²² Article 4 of Annex 4 to the 2005 Regulations; see also Article 6(3) of the 2001 Application Regulations.

²³ Article 5(1) of Annex 4 to the 2005 Regulations; similar Article 7(3) of the 2001 Application Regulations, according to which compensation was based on the training costs in the country in which the new club was situated; however, the applicable category of club was determined by the old club.

by either (i) the total of training years, where a player is registered as professional for the first time or (ii) the number of years of training with the former club²⁴.

However, for players moving from one association to another inside the territory of the EEA, the amount of training compensation is established as follows: (a) if the player moves from a lower to a higher category club, the calculation shall be based on the average of the training costs of the two clubs and (b) if the player moves from a higher to a lower category club, the calculation is based on the training costs of the lower category club²⁵. Also, if a club within the EEA does not offer a player a new contract, it is not entitled to training compensation, unless it can justify that it is entitled to such compensation²⁶.

To ensure that training costs for very young players are not set at unreasonably high levels, the training costs for players for the seasons between their 12th and 15th birthdays shall be based on the training and education costs for category four clubs²⁷.

Solidarity Mechanism²⁸

For every mid-contract transfer of a player, five percent of any compensation paid to the former club²⁹ will be redistributed to the clubs involved in the training and education of the player over the years. This solidarity contribution will then be divided between the training clubs according to the number of years a player was registered with a club and his age at the time the training was provided.

²⁴ Article 5(2) of Annex 4 to the 2005 Regulations; similar to the 2001 Application Regulations.

²⁵ Article 6(1) of Annex 4 to the 2005 Regulations; see also Article 7(4) of the 2001 Application Regulations.

²⁶ Article 6(3) of Annex 4 to the 2005 Regulations; slightly different from Article 7(3) of the 2001 Application Regulations, according to which in such a case the fact that the former club did not offer the player a new contract, “shall be taken into account in determining the training compensation”.

²⁷ Article 5(3) of Annex 4 to the 2005 Regulations; see also Article 7(2) of the 2001 Application Regulations.

²⁸ Article 1 of Annex 5 to the 2005 Regulations; see also Article 10 of the 2001 Application Regulations.

²⁹ Article 1 of Annex 5 to the 2005 Regulations now clarifies that this does not apply to training compensation.

Contract Stability

■ Duration of Contracts

Since the minimum contract length of one year established in the 2001 Regulations³⁰ was heavily criticised, the current transfer rules allow for shorter contracts. Still, contracts must have a minimum duration from their entry into force to the end of the season. The maximum duration of five years remained unchanged³¹. Contracts of any other length shall only be permitted if consistent with national laws.

■ Respect for Contracts

In principle, a contract between a professional and a club may only be terminated on expiry of the term of the contract or by mutual agreement³². However, the 2005 Regulations additionally provide for the following cases: (a) termination for just cause, (b) termination for sporting just cause and (c) termination without cause.

Termination for just cause³³

A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) in the case of just cause. The 2005 Regulations do not further determine under which circumstances a contract may be determined for just cause; however, it may be assumed that the notion “just cause” is to be interpreted in accordance with the applicable national labour laws.

Termination for sporting just cause³⁴

An established professional who has, in the course of a season, appeared in less than 10% of the official matches in which his club has been involved, may terminate his contract prematurely on the grounds of sporting just cause. The

³⁰ Article 4(2) of the 2001 Regulations.

³¹ Article 18(2) of the 2005 Regulations.

³² Article 13 of the 2005 Regulations.

³³ Article 14 of the 2005 Regulations; a equivalent reference is missing in the 2001 Regulations.

³⁴ Article 15 of the 2005 Regulations; Article 24 of the 2001 Regulations.

existence of such sporting just cause will be established on a case-by-case basis³⁵. In such a case, sporting sanctions shall not be imposed, though compensation may be payable. Whether compensation is payable and the amount of any such compensation shall be determined pursuant to the FIFA dispute resolution procedures. Having said that, a professional may only terminate his contract for sporting just cause in the 15 days following the last official match of the season.

Termination without cause³⁶

The 2001 Regulations have finally opened up the possibility for players unilaterally to terminate their contracts³⁷. However, in all cases where a party breaches a contract without just cause, compensation shall be payable. Unless otherwise provided for in the contract, compensation for breach of contract will be calculated with due respect to applicable national law, the specificity of sport and will take into account all relevant objective criteria such as remuneration and other benefits under the existing contract and/or the new contract, the remaining length of the existing contract, fees or expenses incurred by the former club (amortised over the term of the contract) and whether the breach occurs during a protected period³⁸. The amount of compensation may be stipulated in the contract or agreed between the parties³⁹. The player and his new club are jointly and severally liable for the payment of the compensation for breach of contract⁴⁰.

³⁵ Article 12 of the 2001 Application Regulations clarified in this context that all relevant circumstances, such as injury, suspension, field position and age of the player and his reasonable expectations on the basis of his past career should be taken into account.

³⁶ Articles 16 and 17 of the 2005 Regulations; Articles 21, 22 and 23 of the 2001 Regulations.

³⁷ However, it should be noted that contracts may not be unilaterally terminated during the season, see Article 16 of the 2005 Regulations and Article 21(2)(a) of the 2001 Regulations.

³⁸ The protected period is defined by the 2005 Regulations as follows: (a) if the contract was concluded prior to the 28th birthday of the player, a period of three seasons or three years, whichever comes first, following the entry into force of the contract or (b) if the contract was concluded after the 28th birthday of the player, a period of two seasons or two years, whichever comes first, following the entry into force of the contract; the respective provision (Article 21) in the 2001 Regulations was worded slightly differently, as the protected period was defined exclusively as the first three/two years (as opposed to seasons) of the contract.

³⁹ This possibility was not provided in the 2001 Regulations; however, in some countries such as Spain it has been and still is common practice to have respective provisions on compensation included in player's contracts.

⁴⁰ A equivalent provision is missing in the 2001 Regulations; Article 22 merely stated that "compensation for breach of contract (whether by the player *or* the club)" shall be calculated according to the afore mentioned principles.

■ Sporting Sanctions

In addition to the obligation to pay compensation, sporting sanctions will be imposed on a player found to be in breach of contract during the protected period⁴¹. The player will be suspended for the first four months of the beginning of the next season of the new club⁴². In the case of “aggravating circumstances”, the sanctions may be imposed for up to six months⁴³.

A club signing a player who has unilaterally terminated his contract during a protected period is assumed to have induced the breach and will be prohibited from registering any new players for two registration periods⁴⁴. In addition, pursuant to Article 17(5) of the 2005 Regulations, any person subject to the FIFA statutes and regulations (club officials, agents, players) who acts in a manner designed to induce a breach of contract shall be sanctioned⁴⁵.

Dispute Resolution

In order to deal with any disputes connected with the international transfer of players, in particular arguments over compensation, sporting just cause and mid-contract breaches, a dispute resolution and arbitration system was established by the 2001 Regulations. Originally, parties to a dispute had the choice to submit their case to different institutions: An independent mediator, the Dispute Resolution Chamber and the Football Arbitration Tribunal. The independent mediator⁴⁶, which has now been abolished, was intended to provide a low cost, speedy and informal resolution to any dispute⁴⁷. In case no such solution was found within a month, either party

⁴¹ However, disciplinary measures may be imposed outside the protected period for failure to give due notice of termination, which is deemed to be within fifteen days following the last match of the season, see Article 17(3) of the 2005 Regulations and Article 23(1)(b) of the 2001 Regulations.

⁴² Article 23(1)(a) of the 2001 Regulations.

⁴³ Article 23(1)(c) of the 2001 Regulations named failure to give notice or recurrent breach as such aggravating circumstances.

⁴⁴ Article 17(4) of the 2005 Regulations; Article 23(2)(d) of the 2001 Regulations went even further in this respect, providing additionally that where appropriate clubs inducing a breach may also be subject to fines, deduction of points or exclusion from competitions, irrespective of whether such breach incurred during a protected period.

⁴⁵ It should be noted that such sanctions may also be imposed if a breach occurs outside the protected period; although the 2001 Regulations do not mention the possibility of sanctioning club officials, they also established that sanctions could be imposed on agents, see Article 23(3).

⁴⁶ See the Principles for the amendment of FIFA rules regarding international transfers, point 6, available at www.fifa.com.

⁴⁷ However, according to Article 42(1)(a) of the 2001 Regulations, such mediation was not a precondition to formal dispute resolution mechanisms nor did it have suspensive effect.

could bring the case before the newly created FIFA Dispute Resolution Chamber. Against decisions of the Dispute Resolution Chamber either party could appeal to the Football Arbitration Tribunal.

Whereas the Football Arbitration Tribunal has also been abandoned, the 2005 Regulations have kept the Dispute Resolution Chamber. Additionally, a Player's Status Committee was established. However, what is more important, in contrast to the previous transfer regulations, the 2001 and 2005 Regulations leave parties to a dispute the option of seeking redress before a civil court⁴⁸.

8.3. THE LEGAL STATUS OF THE 2001 "AGREEMENT" BETWEEN FIFA AND THE COMMISSION

Before analysing the 2001 and 2005 FIFA transfer system in the light of the EC Treaty, the legal status of the compromise between FIFA and the Commission ought to be examined. In particular, one may wonder whether the Commission's participation in the drafting of the 2001 Regulations (which have only been slightly amended by the 2005 Regulations) means that the transfer system is safe from being challenged under the provisions of the Treaty.

After the Commission and the football governing bodies had finalised the negotiations over the football transfer system, the Commission announced in a press release that the outcome had been "formalised" in an exchange of letters between FIFA President Blatter and EU Commissioner Monti with the effect that the Commission would close its investigation on the matter⁴⁹. However, does the fact that football has reached what has been called "a legally ambiguous compromise"⁵⁰ with the European Commission signify that the matter is now closed? If one remembers back to the proceedings in *Bosman*, it becomes clear that this is not the case. There the Court, responding to FIFA's argument that the "3+2 rule" on foreign players had been worked out with and "approved" by the Commission, pointed out

⁴⁸ It is interesting to note that while Article 42(1) of the 2001 Regulations stated that the provisions on dispute resolution applied "without prejudice to the right of any player or club to seek redress before a civil court in disputes between clubs and players", Article 22 of the 2005 Regulations only allows players or clubs to refer matters to national courts for "employment-related disputes".

⁴⁹ Commission press release IP/02/824, *op. cit. supra* note 6.

⁵⁰ Weatherill, S., "Fair Play Please: Recent Developments in the Application of EC Law to Sport", (2003) 40 CMLR, p. 68.

that “except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty (see also Joined Cases 142/80 and 143/80 *Amministrazione delle Finanze dello Stato v Essevi and Salengo* [1981] ECR 1413, paragraph 16)”⁵¹. Or as Advocate-General Lenz put it: “The Commission is neither entitled nor in a position to amend the scope or meaning of the provisions of the EC Treaty by its actions. It is for the Court of Justice alone to give binding interpretations of those provisions”⁵². Thus, it is evident that from football’s point of view, the danger is far from over and that any player unhappy with the current transfer rules would theoretically be able to challenge them before the European Court of Justice.

Having said that, special issues concerning legitimate expectations of the companies concerned may be relevant under the rules on competition law. Thus, it has been argued that the Commission itself is, to some extent, bound by the exchange of letters with FIFA in the sense that the “agreement” raises legitimate expectations on the football governing body’s side⁵³. In this context, it has been submitted that the compromise has the appearance of a contract between the Commission, acting on behalf of the Community, and FIFA, which can be qualified as a decision in the meaning of Article 3(1) of Regulation 17, with the effect that it could be challenged under Article 230⁵⁴. Although the Commission has confirmed that it closed its investigations into the football transfer system⁵⁵, it may still monitor the implementation and application of the compromise and in case of non-compliance or new facts re-open the case and continue formal proceedings⁵⁶. Apart from that, the Commission cannot settle a case if the agreement in question infringes EC competition law.

⁵¹ Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v. Bosman and Others* [1995] ECR I-4921, at para 136.

⁵² AG Lenz in *Bosman*, at para 148.

⁵³ See Egger, A. and Stix-Hackl, C., “Sports and Competition Law: A Never-ending Story?”, (2002) 2 CMLR, p. 91; see also Streinz, R. “Der Fall Bosman: Bilanz und neue Fragen”, (2005) ZeuP, p. 352.

⁵⁴ Streinz, R., *op. cit. supra* note 53, p. 352.

⁵⁵ See Commission press release IP/02/824, *op. cit. supra* note 6.

⁵⁶ Egger, A. and Stix-Hackl, *op. cit. supra* note 53, p. 91.

9. THE 2001 AND 2005 FIFA REGULATIONS UNDER ARTICLE 39

It has repeatedly been mentioned that with its decision in *Bosman*, the Court has introduced a “rule of reason” test in the analysis of a practice under Article 39(1) of the Treaty, thereby accepting that restrictive sporting measures may escape the prohibition in Article 39(1), provided they pursue a legitimate aim compatible with the Treaty and are justified by pressing reasons of public interest⁵⁷. Hence, when examining the transfer rules in the light of Article 39(1), it will be necessary to establish whether the FIFA regulations constitute an impediment to the free movement of workers and if so, whether they may be justified under the *Bosman* justificatory test.

9.1. TRANSFER WINDOWS

Evidently, transfer windows have the effect of preventing a player from leaving his club to take up employment in another Member State outside the designated transfer periods. Similarly, a provision that restricts the number of possible transfers of a particular player in a season restricts free movement. However, it has been submitted by scholars that both measures are compatible with Article 39 of the Treaty⁵⁸.

Provisions restricting transfer activity such as transfer windows or a limitation of transfers in one season per player are introduced in order to guarantee a certain stability of teams. It has already been demonstrated that there is a special requirement in football that the composition of a team is ensured over a certain period of time. Not only do managers need time to form a team and train the different individuals to play together, but fans identify themselves with a team to a certain extent and would not be interested in a league whereby footballers move from one club to another on a frequent basis. If the composition of the teams in a league

⁵⁷ *Bosman*, at para 104.

⁵⁸ See Weatherill, S., *op. cit. supra note 50*, p. 70; Lewis, A., Bell, A., Chilvers, C. et al. (eds.), *Sport: Law and Practice* (Butterworths, London, 2002), at para E 2.54; generally, even the original restriction in the 2001 Regulations that prohibited players from moving more than once in a season was accepted.

changed constantly, sporting competition would be pointless, as the different results would not be comparable. Besides, transfer windows serve the purpose of maintaining a degree of sporting balance in the sense that they shall protect small teams from bigger, richer clubs poaching their best players at any time during the season.

The aim of ensuring a stability of team composition to safeguard the functioning and regularity of sporting competition may be taken into account when assessing a restrictive practice under Article 39(1). This has been confirmed in *Lehtonen*⁵⁹, where the Court recognised the need to impose transfer deadlines in order to guarantee the comparability of results. Having stated that the provisions in question were liable to limit the free movement of players who wish to pursue their activity in another Member State, as they prevented transfers of foreign players after a specific date⁶⁰, the Court acknowledged that the setting of transfer deadlines may meet the objective of ensuring the regularity of sporting competitions⁶¹. In this context the Court held that “late transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole”⁶².

Despite the fact that transfer windows are definitely suitable to guarantee the comparability of results by restricting transfer activity to two periods a season, it might be argued that the introduction of transfer deadlines would be less restrictive, as players may move throughout the season, up until a fixed date. However, why should the need to ensure that results are comparable be more prominent at the later stages of a league competition? To put it differently, if teams changed constantly during the first two thirds of a season, would the credibility and regularity of sporting competition not be in danger?

Having said that, it should be mentioned that there have been claims that an active transfer market was in fact one of the most valuable assets of the football

⁵⁹ Case C-176/96 *Jyri Lehtonen and Others v. Fédération Royale Belge des Sociétés de Basket-ball ASBL (FRBSB)* [2000] ECR I-2681.

⁶⁰ *Ibid*, at para 49.

⁶¹ *Ibid*, at para 53.

⁶² *Ibid*, at para 54.

industry, as media exposure in the form of press speculations relating to transfer activity fuelled interest in the game and enhanced the profile of its players⁶³. The same scholars have argued that an unrestricted transfer market would not result in significantly higher transfer activity, as footballers, considering the personal upheaval and domestic disruption, were unlikely to change clubs on a regular basis⁶⁴. Admittedly, players would probably not move from club to club every other week if the transfer market was left unfettered; however, it cannot be denied that transfer activity would increase substantially, in particular as players are now able unilaterally to terminate their contracts after either three or two years without incurring sporting sanctions. Thus, the introduction of fixed transfer periods and the limitation of player movement to three transfers a season must be seen in a wider context as one part of the modified transfer system. Before the adoption of the 2001 FIFA regulations, players under long-term contracts were severely restricted in their movement, making it very unlikely that a player would move more than once during a season. Having established a system whereby players are able to change teams more easily and thus more often, transfer windows and a restriction on the number of times a player may move in one season shall prevent the composition of teams from altering too frequently over the course of the championship. Although the introduction of transfer windows might not be strictly necessary for the very existence of league football, it may be justified as a means to guarantee a certain team stability, a comparability of results and a degree of sporting balance, ensuring the proper functioning of sporting competition. Considering the fact that players are still able to move during two transfer periods a season, the restriction does not seem disproportionate. Moreover, taking into account that subject to certain exceptions, the transfer periods have been harmonised for football leagues around Europe (the first transfer window opens on 1 January until 31 January, the second from the end of the season until 31 August), transfers between clubs in different Member States are not overly restricted, but probably even facilitated owing to the existence of one common system.

⁶³ Morris, P., Morrow, S. & Spink, P., "The New Transfer System in Professional Soccer: An Interdisciplinary Study", (2000/2001) CIL, p. 274.

⁶⁴ *Ibid.*

Despite the fact that transfer windows have been submitted to be in the interest of the clubs, it should be added that their introduction into European football has not been universally welcomed. Especially smaller clubs which cannot afford to sustain large squads have criticised that they will not be able to bring in new players outside the transfer periods at times where the existing team plays badly or is hit by injury⁶⁵. Additionally, there have been claims that clubs suffering from financial difficulties need to be able to liquidate their assets and sell players at any time⁶⁶. Although these arguments may prove that transfer windows are in fact not suitable to achieve a sporting balance between clubs, transfer periods may still be justified on other grounds. Apart from that, it is evident that under Article 39 only the interests of the players, but not the clubs in a less restrictive system may be taken into account. Thus, it is up to the football governing bodies to introduce more flexibility into the system if they consider it necessary to do so⁶⁷.

9.2. TRANSFER RESTRICTIONS FOR MINORS

At first sight, the condition that players under the age of 18 moving within the EEA are only allowed to transfer to a team outwith their home country if suitable arrangements are guaranteed for their sporting training and academic education by their new club, seems to infringe their right to free movement, as clubs incur additional costs and may thus be more reluctant to sign such players. However, it could be argued that restrictive measures providing a stable environment for the training and education of young players are in the public interest and therefore do not fall foul Article 39(1) of the Treaty. At a time where the commercialisation of football has reached an all-time high, especially young players should be protected from employers who are only interested in profit and are not willing to invest time and money in young players' education and training. More importantly, considering the fact that the vast majority of under-age players fail to make the grade in

⁶⁵ See Broadly, I. "SFL admit worries over windows", www.soccernet.com, 9.6.2002, where Scottish League Secretary Peter Donald expresses concerns that some clubs in Scotland may be unable to fulfil their fixtures owing to a lack of available players.

⁶⁶ *Ibid.*

⁶⁷ This has happened with respect to players whose contract has expired prior to the end of a registration period, who may now be registered outside that registration period.

professional football, the significance of a proper academic education for young players becomes evident. Thus, the requirement for clubs to provide players under the age of 18 with an adequate sporting and academic education constitutes an obstacle to the free movement of under-age players, but can be justified by public interest considerations. Since there are no less restrictive means available to achieve the legitimate aim of ensuring the welfare of young players, it is submitted that the measure at issue does not come under the scope of the prohibition laid down in Article 39(1) of the Treaty.

9.3. TRAINING COMPENSATION FOR PLAYERS UNDER 24

Unsurprisingly, the question of training compensation for young players was, and still is, one of the most debated issues in connection with the new FIFA transfer regulations. The re-introduction of transfer fees for out-of-contract players seems to stand in sharp contrast to the Court's decision in the *Bosman* case and does not sit easily with Article 39 of the Treaty. The argument brought forward by international football officials for the requirement of a training compensation for under-24s is that in order to promote player talent and stimulate competition in football, clubs should have the necessary financial and sporting incentives to invest in training and educate young players. Furthermore it is submitted that clubs which are involved in the training and education process should be rewarded for their contribution. However, opponents of the new scheme object to the re-introduction of transfer fees for out-of-contract players under the age of 24, stressing that it restricts young players' right to free movement⁶⁸.

It has been repeatedly mentioned that the aims of encouraging the training of young players and of sustaining a larger number of clubs than would survive under normal market conditions by supporting smaller, less wealthy clubs have been acknowledged under EC law. The ready acceptance by the Court and the Commission of the need to encourage and reward the training efforts of clubs has been criticised by Weatherill, stating that on this point the special status of sport was

⁶⁸ See "Time for a New Approach: The International Transfer System", FIFPRO Report to the European Commission, 9.2.2001, available at www.fifpronet.com, point 4.1; Morris, P., Morrow, S. & Spink, P., *op. cit. supra note 63*, p. 268.

exaggerated⁶⁹. He compares the situation in football to other industries, asking, “where is the reason for supposing that a football club is any less likely to train young employees because they might subsequently quit the company than a bank or a University would be”⁷⁰. Despite acknowledging that “a transfer system doubtless encourages a higher level of investment in training than would otherwise occur”⁷¹, Weatherill does not support the argument that small clubs require protection from wealthier clubs poaching their youth players without compensating them for their efforts.

The main difference between football and other industries lies in the fact that a club taking on a youngster cannot be sure that he will turn into a successful player who justifies the expenses spent on his training. Admittedly, a bank which trains a young employee does not have the certainty either that he or she will become a valuable addition to its workforce, but taking into account that only a handful of young prospects turn out to have the necessary talent to play football professionally, it is evident that the drop out rate in football is extensively higher than in other sectors⁷². Thus, clubs often spend great sums on the training of youngsters without receiving any reward, which makes it tempting to buy cheap foreigners or already established players who have passed their peak. Considering that, it becomes evident that investment in the development of young players needs to be encouraged.

Moreover, since the majority of work at grassroots and youth level is done by lower league clubs, it has been proposed that especially these clubs benefit from training compensations, resulting in a re-distribution of funds from richer to less wealthy clubs. Additionally, compensation payments are also claimed to be necessary for the survival of smaller clubs, as funds generated by the sale of youth players are their main source of income.

⁶⁹ Weatherill, S., *op. cit. supra note 50*, p. 71, similarly Morris, P., Morrow, S. & Spink, P., *op. cit. supra note 63*, p. 266.

⁷⁰ Morris, P., Morrow, S. & Spink, P., *op. cit. supra note 63*, p. 266.

⁷¹ *Ibid.*

⁷² See for example the Scottish Parliament Official Report of the European Committee from 19.9.2000 on the inquiry into football transfer fees and the position of the European Commission, in particular the submissions by Lex Gold, representing the Scottish Premier League and David Thomson, representing the Scottish Football League, who claim that the success rate is on average one out of twenty players, available at <http://www.scottish.parliament.uk/business/committees/historic/europe/reports-00/eur00-05-02.htm#annexB>.

However, the assumption that the newly introduced training compensation payments do in fact encourage the training of young players and distribute funds to smaller clubs is not universally acknowledged. Thus, before the introduction of the 2001 Regulations economists criticised that the proposed transfer system “would only enhance the windfall profits of clubs that have not invested in a talent’s education, whereas the long-term utilities of talents and the incentives to invest in a talent’s education are discouraged”⁷³. Having said that, it appears that ultimately more economic research and empirical evidence would be needed to assess whether the rules on training compensation are indeed suitable to achieve the proposed aims.

Be that as it may, in his extensive analysis of the subject, Advocate-General Lenz took the view that training compensation for young players was an adequate means to preserve the sporting equilibrium, distributing funds from richer to less wealthy clubs and to encourage youth development. Thus, the Advocate-General considered training compensation for young players as being acceptable under Article 39 of the Treaty, albeit subject to two conditions: firstly, the fees would have to reflect the actual amount spent on the player’s training (a point which will be discussed later on), and secondly, they should be limited to a player’s first change of clubs⁷⁴. Regarding the latter condition, it has been argued that in view of the increased mobility of young players in the game, the 2001 (and 2005) Regulations, giving each club involved in a player’s training the possibility to profit from its investment in his education and development, constitutes a more appropriate solution than the Advocate-General’s proposal⁷⁵. Taking into account that these days many players have moved clubs two or three times before reaching the age of 21, it certainly makes sense that not only the first, but all clubs which have contributed to a player’s development should be able to benefit. Thus, once the rationale behind the transfer fee is acknowledged, there is no reason to restrict payments to the first move,

⁷³ Feess, E. & Mühlheusser, G. “The impact of transfer fee systems on professional football: an analysis of the European Commission’s new suggestions”, 5.12.2001, available at <http://www.rwth-aachen.de/vwl1/forschung/Sje3.ps>; similar also Terviö, M. “Transfer Fees and Development of Talent”, 14.2.2004, available at <http://faculty.haas.berkeley.edu/marko/TransferFees.pdf>.

⁷⁴ See AG Lenz in *Bosman*, at para 239.

⁷⁵ See Morris, P., Morrow, S. & Spink, P., *op. cit. supra* note 63, p. 267.

in fact, it would seem highly unfair to reward the first, but not the other clubs which have invested in a player's training.

Admittedly, one could raise the argument that there are less restrictive means such as re-distribution measures available to preserve a sporting equilibrium and encourage youth development⁷⁶. However, as already mentioned, there exists contradictory economic research as to whether the re-distribution of funds does in fact promote a sporting equilibrium⁷⁷. Additionally, there have been claims that rewarding small clubs for their mere existence discourages them from investing in the training of youngsters⁷⁸. Owing to the distinct lack of empirical evidence, the matter remains unsolved and must be left to economic debate. In any case, one cannot easily dismiss the opinion of Advocate-General Lenz who pointed out that “the argument that a club should be compensated for the training work it has done, and that the big, rich clubs should not be enabled to enjoy the fruits of that work without making any contribution of their own, does indeed [...] have some weight”⁷⁹.

Although training compensation for young players may be recognised under Community law as a tool to encourage the investment in the development of young players, it should be noted that such payments might not be accepted under the applicable national laws. In Austria, for example, employees may be contractually bound for a maximum period of five years if the employer has provided the worker with special training or education, which increases the employee's marketability on the employment market. If the employee decides to leave before the agreed period of time, the employer is entitled to training compensation, depending on how long the employee has worked for him. The training compensation provided for by the 2001 Regulations was considered to fall foul Austrian employment law, as the requirement to pay the compensation was (and still is) unlimited in time and does not decrease in

⁷⁶ See Morris, P., Morrow, S. & Spink, P., *op. cit. supra note 63*, p. 268.

⁷⁷ In agreement see Késenne, S., “Revenue Sharing and Competitive Balance in Professional Team Sports”, (2000) 1(1) *Journal of Sports Economics*, pp. 56 – 65; Schellhaaß & Enderle, “Sportlicher versus ökonomischer Wettbewerb“, *Arbeitspapiere des Instituts für Rundfunkökonomie und der Universität zu Köln*, Issue No. 95/98, June 1998, p.7; in contrast see Feess, E. & Stähler, F., “Revenue Sharing in Professional Sports Leagues” (2002), p.1, available at http://gemini.econ.umd.edu/cgi-bin/conference/download.cgi?db_name=IIPF59&paper_id=87.

⁷⁸ Feess, E. & Stähler, F., *op. cit. supra note 77*.

⁷⁹ See AG Lenz in *Bosman*, at para 239.

relation to the time the employee has worked for the employer, but in contrast increases⁸⁰. Moreover, under Austrian law, minors may only enter such a contractual obligation subject to judicial consent, which obviously poses a major problem in connection with the FIFA regulations. The fact that the requirement to pay training compensation does not result from an agreement between employer and employee, but is provided for by the FIFA transfer rules cannot change the fact that the payment is in breach of Austrian law, as such an arrangement constitutes a circumvention of laws imposed to guarantee the protection of employees.

9.3.1. The Age Cut-Off Point

Another point that has been heavily discussed in relation to the training compensation system is the cut-off point at the age of 21/23, a borderline that has been criticised as being “arbitrary” and “artificial”⁸¹. The difficulty in trying to establish a system compensating clubs for their investment in the training of young players lies in the fact that each player develops at his own pace and it is almost impossible to define an age at which the training process of a typical footballer is finished. Some players, like Wayne Rooney, who holds the record of being the youngest footballer ever to have played for England (at an age of 17 years and 111 days) and, despite his tender age of 18 was one of the most prominent players of the 2004 European Championships, already play football at the highest level at a very young age, whereas others require more training and reach their peak at a later stage of their playing career. Arguably, the training process never stops as players need to train and develop their skills throughout their careers, probably even more so when they become older and their stamina decreases. Thus, it has been submitted that there was “nothing in substance, quality or significance to differentiate between training that takes place before age 21 and that which takes place after”⁸². The 2001 and 2005 Regulations state that the training and education period of a player generally expands from the age of 12 to the age of 23, whereby training compensation shall be payable up to the age of 23 for training incurred up to the age of 21, unless it is evident that a

⁸⁰ See Resch, R., “Europarechtliche Fragen zur Ausbildungsentschädigung, Transfersystem und dem Recht des Spielers auf Freigabe”, (2004) 1 Das Recht der Arbeit, pp. 87 – 97.

⁸¹ See Morris, P., Morrow, S. & Spink, P., *op. cit. supra note 63*, p. 266.

⁸² *Ibid*, p. 267.

player has already terminated his training before the age of 21. With the training period starting as early as the age of 12, not only the big clubs, but also smaller clubs at grass roots level will be able to profit when a player they nurtured at a young age turns out to become a professional. Again, this underlines the rationale behind the transfer system, to compensate those clubs who invest funds at youth level, at a point when it is often impossible to tell whether a player has the skill and determination to be successful at a later stage of his playing career. However, although the objective behind the compensation scheme may be laudable, the problem of the somewhat arbitrary cut-off point at the age of 21/23 remains. Having said that, despite the fact that there are always exceptions to the rule, it could be argued that the majority of players will not be playing regular first-team football before the age of 21. Moreover, up to this age there are still many players who, even though they might have secured a contract with a professional club at first, drop out because they do not have what it takes to make a career out of football. The difference between training an already established player and investing in the development of a youngster lies in the fact that it is more difficult to predict the potential of a player at a young age, whereas a club buying a 25-year old will usually be able to judge his strengths and weaknesses. Of course older players are more injury prone and there are a great deal of footballers whose potential as star players is recognisable at a very young age, but once it is accepted that the rationale behind the compensation scheme is to encourage clubs to invest in the training and education of youth, it is necessary to establish a cut-off point, defining when a player is deemed to be "young". The advantage of an age limit, at which it is assumed that a player's training process is finished, is that it is clear and easy to apply. On the other hand, it would probably reflect the reality of football better if players making regular first team appearances from an early age would be excluded from the compensation system. It certainly seems bizarre that a club selling its 20 year old star striker should be rewarded for training him despite the fact that the team has profited more from playing him than it has invested in the player's training. The transfer rules seem to have provided for this case by stating that players who have evidently terminated their training period before the age of 21 will be treated differently; however, as it is not defined when a player is deemed to have finished his training, the rule will be difficult to apply. In any case, as pointed

out before there are good reasons to argue that a club investing in young players should be allowed to reap the benefits of a successful youth policy.

9.3.2. The Calculation Scheme

Apart from the question whether the introduction of compensation payments for under 24s principally breaches Article 39 of the Treaty, criticism has also been expressed in relation to the calculation scheme adopted by FIFA⁸³. In connection with the introduction of the 2001 system, FIFA pointed out “since it is impossible to calculate the effective training costs for every single player, flat training rates should be set and the clubs should be categorised in accordance with their financial investment in the training of players”⁸⁴. This stands in contrast to Advocate-General Lenz’ opinion, who would only accept transfer fees compensating a club for the training of a particular player, limited to the actual amount expended by the previous club (or previous clubs) for the player’s training⁸⁵. However, if it is assumed that the aim of encouraging clubs to spend money on the training of young players is legitimate and considering the afore mentioned problem that clubs will only receive transfer fees for a fraction of the youngsters in whose training they have invested, a transfer system which refers to the overall amount a club uses for the training of players would not necessarily fall foul Article 39 of the Treaty, provided it adheres to the principles of transparency and objectivity. Moreover, taking into account the organisational and administrative difficulties involved in a system whereby compensation payments are established on a case-by-case basis for each individual player, a complicated process which offers room for litigation, a calculation model which is based on the overall financial investment of a club in the training of young players would be less subjective and much easier to apply⁸⁶.

However, it is submitted that the calculation scheme adopted by FIFA is open to criticism. Firstly, it could be argued that while it is acceptable to determine training compensation on the basis of a club’s overall financial investment in

⁸³ See news item of 1.4.2003, “Calculation of training costs is question mark in new transfer system”, available at www.fifpro.org.

⁸⁴ Point B 1. of the Annex to the Principles for the amendment of FIFA rules regarding international transfers.

⁸⁵ AG Lenz in *Bosman*, at para 239.

⁸⁶ See also Morris, P., Morrow, S. & Spink, P., *op. cit. supra note 63*, p. 266.

training, a division of all clubs in a league into just four categories does not offer the necessary degree of objectivity. Moreover, training costs are set by the respective national association for each category and shall correspond to the amount needed to train one player for one year multiplied by the average “player factor”, which is the ratio between the number of players needed to be trained to produce one professional. Again, it could be argued that a rule assuming the same training costs per player for all clubs in a category does not satisfy the requirement of training compensation having to reflect the costs actually incurred. Apart from that, since the transfer regulations leave it entirely to the national associations to establish the training costs, the system lacks transparency. Another critical issue is the consideration of the “player factor”. It has been submitted that the principal necessity of training compensation may be derived from the fact that the majority of young players will not become professionals and clubs should at least be compensated for the training of those players who actually make it. However, this does not automatically mean that the costs incurred for the training of unsuccessful players may be taken into account when calculating the training compensation for a young professional. Once again the key question is to what extent training compensation must reflect the actual costs for the training of a particular player. Whereas a restriction on the free movement of a young player resulting from the requirement to pay compensation for the training of the same player may be acceptable, considering that he actually benefited from the training, an even bigger impediment which derives from the reimbursement of costs which are completely unrelated to the player in question might go too far. On the other hand, once the need to promote youth development is acknowledged, arguably clubs should be rewarded for their overall investment in youth, not only for the training of the players that become professionals. Having said that, since clubs are categorised according to their overall spending on training, this has already been taken into account.

The training compensation scheme adopted by FIFA is also open to criticism in another respect. According to Article 6(1)(a) of Annex 4 to the 2005 Regulations, in case of players moving within the EEA from a lower to a higher category club, the calculation of the training compensation shall be based on the average training costs of the two clubs. Thus, not only the costs of the selling club are taken into account,

but also the costs which the buying club would have incurred for training the player itself are considered. This means that the training compensation is completely unrelated to the selling club's training costs or overall investment in youth policy. In respect of players moving from a higher to a lower category club, this becomes even more evident, as the compensation is calculated according to the training costs of the buying club. It is interesting to note that for moves outside the EEA, this applies as a general rule, irrespective of the transfer direction. Be that as it may, it is submitted that the calculation of training compensation must at least have some relation to the funds spent on youth training by the selling club, if not to the actual costs for the training of a particular player. Hence, a fee that is based on the training costs of the buying club cannot be considered compensation for training and infringes Article 39(1) of the Treaty, as it puts a burden on a player which has no relation to the player himself.

Having said that, it could be argued that the described calculation scheme enhances the sporting equilibrium as it favours less wealthy clubs. Generally, bigger clubs will have more funds available for youth training and will thus be in a higher category. A lower category club buying a player pays less than a higher category club signing the same player. Additionally, lower category clubs receive more compensation if they sell a player to a club in a higher category, as the training costs of the latter are taken into account⁸⁷. Still, if one follows the rationale of Advocate-General Lenz in *Bosman*, training compensation is only acceptable if it is indeed a compensation for costs incurred by training clubs and not as a measure of re-distribution. Whereas it might be possible to argue that such compensation may be calculated on the basis of the overall funds spent on training by a particular club in order to promote the investment in youth development, there are less restrictive means available to achieve a re-distribution of funds. Moreover, it should be mentioned that the current calculation scheme has been criticised in the sense that it

⁸⁷ Considering that in the case of players moving from a higher to a lower category club, the compensation is based on the costs of the buying club, it is not understandable why FIFA decided that in the reverse case, in the EEA the compensation should be based on the average training costs of both clubs. From an EC law point of view, it is either acceptable that training compensation is based on the costs of the buying club or it is considered to infringe Community law, in which case it would not be necessary to apply special rules for the EEA, as the first case would cause a problem anyway.

is argued to favour wealthier clubs and offers a risk of transferring resources to and not from the big clubs⁸⁸.

The general problem with any calculation scheme for training compensation is that it is almost impossible to achieve a satisfactory degree of objectivity, reflecting the actual training costs for a particular player as accurately as possible, whilst remaining transparent and practical to apply. It has to be considered that for a transfer system to work, a club buying a certain player must be able to judge the costs involved with the signing of such a player. The current transfer compensation scheme is submitted to fail both requirements: it is lacking in objectivity whilst being very complex and too complicated in its application.

9.4. SOLIDARITY MECHANISM

Re-distribution measures such as the solidarity mechanism set up by the 2001 and 2005 Regulations have been widely accepted as being legitimate under Article 39 of the Treaty. The Court in *Bosman*, for example, dismissed the argument that the transfer rules at issue were necessary to ensure the aims of maintaining a competitive balance and encouraging youth development and, referring to the Advocate-General's suggestion of introducing re-distribution measures, stressed that the same aims could be achieved "at least as efficiently by other means which do not impede the free movement for workers"⁸⁹.

In principle, a re-distribution of income between clubs does not restrict the players' right to free movement, as it does not hinder a player moving from one club to another in a different Member State. Besides, the aim of preserving a sporting balance between clubs is acknowledged under EC law. However, it should be repeated at this point that re-distribution measures as a means to establish a sporting equilibrium or to promote youth development are not undisputed as regards their suitability to achieving the aims in question. In the case of the solidarity mechanism introduced by the 2001 Regulations the income that is re-distributed is not generated from gate-receipts or television revenue, but from compensation fees payable on the

⁸⁸ See FIFpro Report to the Commission, *op. cit. supra* note 68, points 4.7. and 4.8, see also Morris, P., Morrow, S. & Spink, P., *op. cit. supra* note 63, p. 266.

⁸⁹ *Bosman*, at para 110.

occasion of a player over the age of 23 moving during the course of a contract. Considering that, it is evident that as a pre-condition for the solidarity mechanism to be in accordance with the right to free movement, the compensation payments for breach of contract must not fall foul EC law.

9.5. DURATION OF CONTRACTS

The introduction of a maximum length for players' contracts of five years is certainly one of the most important changes to the football transfer system, as it puts an end to contracts binding players for a major part of their careers. Considering the fact that player now have the option unilaterally to terminate their contracts – albeit subject to compensation payments and/or sporting sanctions – a maximum contract length of five years does not seem excessive. This is underlined by the fact that in Member States like Austria or Germany the conclusion of employment contracts of up to five years is possible.

However, one may wonder whether the requirement of a minimum duration of contracts constitutes an obstacle to the free movement of workers. Despite the fact that a minimum length of contract necessarily restricts a player's right to free movement, such a measure may be accepted under Article 39 of the Treaty, provided it is necessary to ensure a certain stability of teams⁹⁰. If players were allowed to change clubs every few months, credible competition would be impossible because of the constant team fluctuation. Besides, managers need the assurance of having the same players available over a certain period of time in order seriously to build and work with a team. However, taking the new transfer system as a whole, it could be argued that team stability is sufficiently guaranteed by the introduction of transfer windows and a requirement for a minimum contract length is not necessary. This was particularly true for the 2001 Regulations, which provided for a minimum contract length of one year. Although this will usually not create too heavy a restriction for the majority of players who generally commit themselves for longer than that anyway, it might be of concern for a player going through a difficult patch or who is at the end of his career. In those cases where a club does not want to take the risk of

⁹⁰ In contrast see Morris, P., Morrow, S. & Spink, P., *op. cit. supra* note 63, p. 269.

offering a player a one-year contract because he is too old or out of form, but would be willing to take him on for a few months, giving the player the chance to prove himself, such a restriction could mean the difference between playing or having to quit football. Thus, while the requirement of a minimum contract length of one year may be legitimate where no other measures ensuring a stability of contracts are put into place, it constituted a disproportionate restriction on free movement in connection with the afore mentioned limitations on transfer activity introduced by the 2001 Regulations. Having said that, this has been remedied by the 2005 Regulations, which now allow for shorter contracts, albeit still providing for a minimum period expanding from the coming into force of a contract until the end of the season. Be that as it may, it should be kept in mind that the minimum and maximum duration of contracts is subject to national law, which obviously limits the application of this provision.

As a matter of interest, it should be added that according to economic research the more legal freedom the parties have when negotiating a contract, the better for the football market, arguing that the pre-*Bosman* system did in fact promote the competitive balance between clubs to a higher extent than the 2001 transfer regulations⁹¹. However, even if it is assumed that the most restrictive system in terms of player movement would achieve the most balanced football market and offered the most incentives for clubs to invest in the training of young players, it has to be remembered that Article 39 is first and foremost a tool to ensure the free movement of workers and only justifies restrictive measures if they are absolutely necessary to achieve a legitimate aim. Although the aim of maintaining a competitive balance between clubs has been accepted under the provision on free movement, it cannot outweigh the interest of the players. As Weatherill emphasised: “the whole point of the *Bosman* ruling [...] is that the interests of the clubs cannot be expressed by imposing burdens on the shoulders of the players”⁹².

⁹¹ Feess, E. & Mühlheusser, G. “Transfer fee regulations in European football”, (2003) 47(4) *European Economic Review*, pp. 645 – 668.

⁹² Weatherill, S., “Do sporting associations make law or are they merely subject to it?”, (1999) 13 *Amicus Curiae*, p. 27.

9.6. RESPECT FOR CONTRACTS

When analysing the 2001 and 2005 transfer system in respect of measures ensuring contract stability, it appears that two different tools have been put into place in order to keep players from terminating their contracts prematurely. Firstly, in any case of a unilateral breach of contract, compensation shall be payable and secondly, if a player moves to a new club during the protected period without his former club's consent, sport sanctions will be imposed.

9.6.1. Compensation for Breach of Contract

Evidently, a requirement to compensate the former club for breach of contract whenever a contract is terminated unilaterally by a player restricts the free movement of workers. However, it has already been explained that a certain stability of contracts constitutes a pre-condition for the proper functioning of sporting competition, a goal which is recognised under Article 39 of the Treaty. Although it may not be a common legal requirement for an employee to be obliged to compensate his employer in case of a unilateral termination of contract, the practice is not unheard of when it comes to highly skilled employees such as top-managers. In football such compensation payments are needed to ensure that contracts are respected. Footballers are not only highly skilled and well paid employees, but are part of a team. Each player has a special role within that team and as a consequence footballers are not as easily replaced as for example shopping assistants. Besides, in order to find a replacement, clubs often have to pay transfer fees or are forced to engage a player on substantially higher wages. Thus, restrictions such as a requirement to pay compensation for breach of contract when a worker terminates a fixed-term contract can be found in the national laws of most Member States. As pointed out by Welch in respect of English contract law: "the argument that footballers are subject to constraints not suffered by other employees has been overstated" since "it is by no means only those employed in football or other

professional sports who find themselves bound by contracts from which they would like to secure release”⁹³.

In view of the special situation in football, one could argue that the stability of contracts is of even bigger importance compared to other industries, which is why restrictive measures to ensure that contracts are being honoured should be tolerated to a greater extent. Having said that, compensation payments for breach of contract will only be in compliance with Article 39 of the Treaty if they reflect the true financial disadvantage of a club caused by the premature departure of a player and satisfy the principle of proportionality.

Compensation for breach of contract shall be calculated with regard to objective criteria, such as remuneration, length of time remaining on the existing contract, amount of expense incurred by the old club (amortised over the length of contract) and whether the breach occurs during the “protected period”. Additionally, it is stressed that compensation shall be calculated “with due consideration for the law of the country concerned”. Unlike the traditional transfer fees, the compensation scheme pays attention to the individual circumstances of the case in question, reflecting the loss incurred by a specific club. Moreover, the interest of the player is taken into account by reducing the due compensation according to the length of time remaining on his contract. The calculation criteria used and the fact that reference is made to the applicable national law shows that the requirement for players to compensate their old club for loss incurred as a result of a breach of contract does not constitute a hidden transfer system, but endeavours to preserve a certain stability of contracts, choosing means proportionate to the aim in question.

9.6.2. Sporting Sanctions

Whilst compensation payments for breach of contract, in particular as they are provided for by the national laws of the Member States, are generally accepted, the imposition of sporting sanctions in order to ensure that contracts are respected is highly disputed.

⁹³ Welch, R. “From Self-Regulation to *Bosman* – There and Back Again”, (2001) 4(4) SLB, p. 15.

Evidently, a suspension imposed by the game's governing authorities severely restricts a player's right to free movement, as it makes it impossible for him to practice his trade. Thus, sporting sanctions are only permissible if they are absolutely necessary to achieve a legitimate aim and there are no less restrictive means available. In this context, it has been submitted that collective action by the sport's governing bodies designed to encourage observance of an individual contract rather than leaving the matter to applicable national law goes beyond what is acceptable under EC law⁹⁴. Moreover, scholars have criticised that there is no precedent in the employment laws of the Member States which would allow the imposition of additional sanctions besides damages for breach of contract, especially in so far as they result in an absolute ban on an employee working in his profession⁹⁵.

According to the 2001 and 2005 Regulations, a player who breaches his contract during a protected period may be banned for four (under aggravating circumstances for six) months, starting with the beginning of the new season. Additionally, sanctions such as a prohibition on registering new players for a year may be imposed on clubs registering contract breakers. While these measures undoubtedly constitute a two-fold restriction on the free movement of players in the sense that not only the footballers who unilaterally terminate their contracts will not be eligible to play for their new clubs, but also clubs which sign them are punished, it is evident that they were put into place in order to ensure that contracts are respected. As has already been repeatedly stated, the aim of achieving a certain stability of contracts must be recognised under Article 39 of the Treaty. However, one may wonder whether the appliance of sporting sanctions unreasonably restricts a player's right to free movement. The national laws of the Member States usually recognise certain post-contract restrictions such as a prohibition on taking up employment with competitors under certain circumstances, depending on the duration of the ban and the position of the worker; however sanctions for breach of contract imposed by

⁹⁴ Weatherill, S., *op. cit. supra note 50*, p. 70.

⁹⁵ Morris, P., Morrow, S. & Spink, P., *op. cit. supra note 63*, p. 272; however, as far as English law is concerned, it was mentioned above that English courts have granted injunctions in relation to contractual commitments of up to 20 weeks, which implies that the sporting sanctions provided for by the 2001 Regulations might not be considered disproportionate in English law, see *Warner Bros Inc v. Nelson* [1936] 3 All ER 160.

private parties which make it impossible for a worker to practice his trade after leaving his employer do only exist in sport.

In this context, it should be emphasised again that there exists a special need for contract stability in team sports. Apart from that, nowadays the majority of footballers have agents negotiating their contracts for them, which means that the players know what they let themselves in for. Considering the legal principle of *pacta sunt servanda* players should in principle be bound by their contracts and punished for a breach of the contractual obligation. Moreover, taking into account the incredible sums clubs have been prepared to pay for certain players in the past, it becomes evident that a financial penalty alone cannot ensure that contracts are honoured. Thus, although the career of the average footballer is fairly short, a protected period of either three or two years and a possible ban for either four or six months at most does not seem disproportionate⁹⁶. Similarly, the imposition of sporting sanctions on clubs seeking to register a player who has breached his contract during the protected period is legitimate as clubs will usually know whether a player has left without the consent of his former club and the practice of poaching players may only be effectively combated by punishing the new club, as well as the player. However, as always, the sanctions must not go beyond of what is necessary to achieve the aim of ensuring the stability of contracts, which may be of particular concern in those cases where sporting sanctions such as a ban on signing new players are imposed⁹⁷.

⁹⁶ See also the Commission's point of view in Case IV/36.583 *SETCA-FGTB/FIFA*, rejection of complaint of 28 May 2002, p. 12, "Si un joueur pouvait rompre unilatéralement son contrat dès la première année et être transféré à la fin de la saison vers un autre club, sans aucune sanction autre que la compensation financière, son club d'origine n'aurait pas de possibilité de construire convenablement son équipe. Les sanctions visent donc à démotiver les joueurs de rompre unilatéralement leurs contrats pendant les deux premières années pour permettre l'existence d'équipes stables. En raison des spécificités du secteur en cause la durée de la période protégée et des sanctions semble être proportionnée aux objectifs légitimes qu'elles visent à atteindre".

⁹⁷ This was particularly critical in respect of the 2001 Regulations which provided for the possibility to impose sporting sanctions such as the deduction of points or even the exclusion from a competition on clubs buying players who had unilaterally terminated their contracts. That the rules on illicit poaching of players are highly disputed was recently shown by the case of Ashley Cole who was approached by Chelsea whilst still under contract with Arsenal. As Arsenal had not given its consent to contract negotiations with the player, Chelsea was fined € 450,000, its manager Jose Mourinho € 300,000 and Ashley Cole € 150,000. Ashley Cole's lawyer announced that he would appeal against the fine and threatened to go to the European Court of Justice if necessary. Although Ashley Cole has meanwhile signed a new contract with Arsenal, the matter is far from settled, since it seems only a question of time until a similar situation arises in a cross-border

Finally, it should be noted that there are exceptions to the principle that in the case of a unilateral termination of contract by the player financial and/or sporting sanctions will be imposed. Where a player leaves before the expiry of his contract for a “just cause” or “sporting just cause”, he will not be punished for breach of contract. However, while the notion of “sporting just cause” is defined, the transfer regulations give no indication of what a “just cause” might constitute at all. In the absence of an explanation, it may be assumed that the term “just cause” refers to circumstances under which an employment contract may be terminated under national law. Such an interpretation would make sense in so far as a player who leaves a club for reasons recognised as being legitimate under national labour law should not be sanctioned by the football authorities for breach of contract.

As regards to the notion of “sporting just causes”, the transfer rules establish that a player who has been fielded in less than ten percent of the matches played by his club may not be bound by his contract. However, the existence of such a sporting just cause shall be established on a case-by-case basis, giving due consideration to the player’s circumstances⁹⁸. As a matter of interest it should be mentioned that the 2001 Regulations merely mentioned the 10% rule as an example, leaving room for other sporting just causes. This led to rumours that FIFA would allow a player to walk out on his club if he did not agree with the tactics used by the manager⁹⁹. Considering the upheaval caused by the ambiguity of the definition of “sporting just cause”, it is not surprising that the provision has now been limited to the described 10% rule.

context and a club or player will invoke the provisions on free movement to appeal against a fine imposed for illicit contract negotiations.

⁹⁸ Article 15 of the 2005 Regulations; Article 12 of the Application of the 2001 Regulations established in this context that the particular circumstances of the player, such as injury, suspension, field position, position in the team (e.g. reserve goal keeper), age and reasonable expectations on the basis of his past career must be considered.

⁹⁹ See McAuley, D. “They think it’s all over ... it might just be now: Unravelling the ramifications for the European Football Transfer System Post-Bosman”, (2002) 23(7) ECLR, p. 338.

10. THE 2001 AND 2005 REGULATIONS UNDER ARTICLE 81

10.1. TRANSFER WINDOWS

A limitation on transfer activity to two fixed periods a season evidently has the effect of restricting competition to a certain extent. In the absence of such provisions, clubs would be able to bring in new players over the whole year in order to strengthen their team and increase its marketability. This is particularly evident in the case of smaller clubs which have argued to be disadvantaged by the introduction of transfer windows¹⁰⁰ and in contrast to Article 39, such concerns have to be taken into account under the rules on competition law.

Still, transfer windows could be necessary for creating and guaranteeing a competition between clubs at all. In this sense, Advocate-General Albers compared the transfer restrictions in *Lehtonen* to the provisions at issue in *Göttrup-Klim*¹⁰¹, arguing that transfer deadlines may have the effect of promoting the establishment of competition, as they ensure comparability of results of matches within a season¹⁰². Having said that, taking into account that football used to function without such restrictions, it is doubtful whether transfer windows may indeed be considered a *conditio sine qua non* for the existence of sporting competition.

However, even if without transfer windows, players would probably not change clubs so frequently that the product football was absolutely unmarketable, they might be justified under the *Wouters* case law as a means to ensure the proper functioning of sporting competition, making football more attractive for consumers. Although transfer activity and speculations over transfers certainly generate some interest in the game, it is submitted that football supporters prefer a certain stability of teams to frequent changes. This has become evident in the discussions

¹⁰⁰ See news item “Transfer window hurts teams like us: Megson”, 26.8.2002, www.soccernet.com, citing former West Bromwich Albion manager Gary Megson, who has described transfer windows as “nonsense” and “unfair, as it suits all the big boys. Most of them don’t make any signings during the season anyway”.

¹⁰¹ Case C-250/92 *Göttrup-Klim v. Dansk Landbrugs Grovvarereselskab* [1994] ECR I-5641.

¹⁰² AG Albers in *Lehtonen*, at paras 106-108.

surrounding the changes to the transfers system in recent years, whereby the fact that footballers have been granted the freedom to move more easily has been severely criticised¹⁰³. On the other hand, it should be mentioned that some scholars take the opposite view, claiming that transfer windows actually make football less attractive. Thus, it is argued that transfer periods prevent the resources (the players) from being allocated where and when there is a need for them, eventually leading to weaker teams and a subsequent loss in consumer interest¹⁰⁴. Considering the afore mentioned concerns that transfer windows might indeed create an even greater disadvantage for smaller clubs, it appears that while the restraints put on players seem to be acceptable under Article 39, the distortion of competition might not be. It cannot be denied that smaller clubs will usually be more affected by the restriction imposed by transfer windows, as they do not have the means to sustain a big squad which would enable them to substitute injured players without having to bring in players from outside. Thus, fixed transfer periods might indeed increase the gap between rich and less rich clubs, eventually leading to a loss in consumer interest or even driving smaller clubs out of the market¹⁰⁵. In order to assess the compatibility of transfer windows with EC competition law, it is necessary to weigh up the need for contract stability against the necessity of a sporting balance, considering which aim takes precedence to ensure the smooth functioning of sporting competition. However, if economic research proves that transfer windows have a negative effect on sporting equality, the restriction put on small clubs will be difficult to justify. Having said that, it should be possible to accommodate the specific needs of less wealthy teams by allowing them to bring in new players outside the fixed transfer period if they are hit by an injury crisis.

¹⁰³ See for example McGarry, I. "The fallout from Bosman 2 will ruin the game", 16.8.2000, www.soccernet.com, expressing concern that changes to the 1997 Regulations, giving players the right to free movement, may lead to the death of "the game as we currently know it".

¹⁰⁴ Camatsos, S., "European Sports, the Transfer System and Competition Law: Will They Ever Find a Competitive Balance?", (2005) 12 Sports Lawyers Journal, p. 170.

¹⁰⁵ In this sense see McAuley, D., "Windows, Caps, Footballs and the European Commission. Confused? You will be", (2003) 24(8) ECLR, p. 397.

10.2. TRANSFER RESTRICTIONS FOR MINORS

Evidently, a rule that requires a club wanting to sign a player under the age of 18 to provide special arrangements for his sporting training and academic education affects competition between clubs. In the absence of such a requirement, clubs could buy and sell under 18 year olds freely with buying clubs not having to incur extra costs and selling clubs not being restricted in their possibilities to transfer a player to another club. Similarly, a prohibition on buying players from non-EEA countries, albeit subject to limited exceptions, undoubtedly restricts the clubs' choice on the player market.

However, it has already been mentioned that the restrictions regarding EEA nationals have been put into place in order to ensure that they receive appropriate training and education. The provision preventing clubs from buying players outwith the EEA recognises the danger that young players, in particular from poor countries in Africa and South America, are being separated from their families in order to play in Europe, where, if they fail to make the grade, the youngsters are being left to their own devices. Thus, both restrictions aim to protect young players, an objective which may be taken into account under the *Wouters* case law. As the provisions adopted do not seem to go beyond of what is necessary to achieve the legitimate goal, it is submitted that they are not caught by the prohibition in Article 81(1) of the Treaty.

10.3. TRAINING COMPENSATION FOR PLAYERS UNDER 24

The re-introduction of transfer fees for a certain group of out-of-contract players undoubtedly has a restrictive effect on competition between clubs. As already pointed out by Advocate-General Lenz in *Bosman*, such rules “replace the normal system of supply and demand by a uniform machinery which leads to the existing competition being preserved and the clubs being deprived of the possibility of making use of chances, with respect to the engagement of players, which would be available to them under normal competitive conditions”¹⁰⁶. Although the compensation payments introduced by the 2001 Regulations only apply to under 24

¹⁰⁶ AG Lenz in *Bosman*, at para 262.

years olds and at least partly reflect the expenses incurred by a club for the training of a player, this cannot change the fact that the requirement to pay such fees for players whose contract has expired restricts competition between clubs in respect of a significant segment of the player market.

However, as mentioned above, the training compensation fees have been introduced in order to encourage clubs to invest in the recruitment and training of young players. Considering the importance of youth football in the game and European society, it has been submitted that the objective of promoting youth development may be taken into account when examining an agreement under Article 81(1) of the Treaty. Having said that, the concerns over the suitability of training compensation payments to achieve the desired aim, already mentioned in the analysis under Article 39, are equally significant in connection with the rules on competition. Thus, where such fees have no relation to the funds actually spent by a club on the training of young players, they are not suitable to encourage the investment in young players' training. As far as the aim of distributing funds from bigger to smaller clubs is concerned, it is submitted that there are less restrictive means available to ensure a sporting balance.

10.4. SOLIDARITY MECHANISM

Evidently, a measure requiring clubs to donate a percentage of transfer income in order to re-distribute funds amongst clubs distorts competition. However, solidarity mechanisms ensuring a certain sporting balance are widely recognised as being legitimate under Article 81(1) of the Treaty. Not only has the European Council in its Nice Declaration encouraged clubs to share part of the revenue from sales of television rights, but also Advocate-General Lenz has suggested such a measure¹⁰⁷. The Commission has recognised the need to guarantee a competitive balance between clubs and considered the re-distribution of revenue as an appropriate means to achieve this objective¹⁰⁸. Thus, as far as re-distribution measures are applied in a fair, objective and transparent manner, they are accepted under Article 81(1) as being

¹⁰⁷ AG Lenz in *Bosman*, at para 226.

¹⁰⁸ Decision 2003/778 *Joint Selling of the Commercial Rights of the UEFA Champions League*, OJ 2003 L 291/25, at para 131.

necessary in order to establish a sporting equilibrium and maintain the consumers' interest.

10.5. DURATION OF CONTRACTS

Whereas the prohibition of contracts binding a player for more than five years is likely to promote competition, the requirement of a minimum duration of contracts evidently restricts competition between clubs to a certain extent. This becomes even more obvious when it is considered that especially small clubs often cannot afford to keep a large squad and might need to strengthen their team on a short-term basis. If a club loses their first-team, as well as the reserve goalkeeper to injury, for example, it is necessary for the club to be able to engage a replacement player for the rest of the season. However, in many cases financially weak teams do not have the funds available to recruit a player until the end of the season, if they only need him for a few months, until the injured player is fit again. This puts smaller clubs at a disadvantage in respect to more successful clubs, which generally have a squad big enough to deal with injuries, and could afford to sign a new player in any case.

Regarding the restriction on the competition between clubs established by the 2001 Regulations, it is submitted that a measure requiring player contracts to have a minimum length of one year may only be justified under special circumstances. As mentioned above, under the 2001 Regulations, other transfer restrictions had been adopted which guaranteed a sufficient degree of team stability. Considering this, a minimum length of contracts of one year fell foul Article 81(1); however, in the absence of other rules ensuring a stability of contracts, such a restriction might be justified. Having said that, the 2005 Regulations are less restrictive in this respect, establishing a minimum contract period from the entry into force of the contract until the end of the season. Assessing this provision individually, it does not seem overly to restrict competition, as it allows clubs to bring in players whenever they need to strengthen their squad. However, although such a rule might be justified considering the need for contract stability, it should be mentioned that it still affects smaller clubs more than richer teams which can afford to keep a player until the end of a season even though he is not needed any more. Moreover, this restriction is enhanced by the fixed transfer periods, effectively leading to a minimum contract period of six

months. Again, it would be necessary to establish the combined effect of these measures on the sporting equilibrium in order to ascertain whether the benefit of contract stability for the functioning of sporting competition is not outweighed by the burden put on smaller teams.

10.6. RESPECT FOR CONTRACTS

It has already been mentioned that a transfer system providing that employment contracts may not be unilaterally terminated at any time inevitably restricts competition to a certain degree. Having said that, it has also been established that the economy can only function if employment contracts are respected and that there is an enhanced need for contract stability in football, which has been recognised in EC competition law.

In contrast to the 1997 Regulations, the new transfer system does not generally prevent a player from moving on to another club without his current employer's consent, but provides for an opportunity to leave before the expiry of the employment contract, albeit subject to the payment of compensation for breach of contract and/or sporting sanctions. As in the case of the mutually agreed transfer fees incurred by clubs under the 1997 Regulations, the requirement to pay a compensation for breach of contract evidently restricts competition. Similarly, the imposition of sporting sanctions on contract breakers undoubtedly distorts competition on the market for players, especially as not only players, but also the clubs that want to employ footballers who have unilaterally terminated their contracts may be sanctioned. In so far as such restrictions are necessary for the functioning of sporting competition and satisfy the principle of proportionality, they do not fall foul Article 81(1) of the Treaty. It has already been stated in the assessment of the transfer system under Article 39 that a compensation for breach of contract in the first five years of the contractual relationship is legitimate and does not go beyond of what is necessary to guarantee that contracts are honoured. This is also applicable to the rules on competition, particularly as the transfer regulations refer to the principles of the national laws of the Member States and the restrictions on competition are limited in time. Again, the more complicated issue is the imposition of sporting sanctions, which puts a heavier restraint on competition than a compensation

payment, as players are not available at all for the period of the sporting ban. The restriction on competition is enhanced by the fact that national employment laws generally do not allow sanctions effectively hindering a worker from practising his trade. Considering the special need in football for contract stability and the fact that the imposition of compensation payments alone is not sufficient to ensure that contracts are honoured, it is submitted that sporting sanctions, provided they are limited in duration should be accepted under Article 81(1) of the Treaty.

The Commission has considered the measures put in place by the 2001 Regulations in order to guarantee a stability of contracts not to restrict competition appreciably by reason of their limited temporal application¹⁰⁹. Having said that, the Commission went on to state that even if it was assumed that they were capable of restricting competition in the sense of Article 81(1), the rules would be eligible for an exemption under Article 81(3) of the Treaty. Thus, it was pointed out that measures ensuring a stability of contracts contributed to the improvement of the production and distribution of sport, as they preserved the integrity of competitions. Additionally, the effect that the composition of teams is guaranteed for a certain period of time was argued to make sporting competitions more interesting for the consumer. Finally, the Commission pointed out that the imposition of sporting sanctions was necessary to achieve a stability of teams and concluded that in view of the specific characteristics of the sporting sector, the restrictions were proportionate to the legitimate aims they were intended to achieve¹¹⁰.

¹⁰⁹ See Case IV/36.583 *SETCA-FGTB/FIFA*, rejection of complaint of 28 May 2002, at para 55: “Elles semblent ne plus constituer des restrictions de concurrence sensible au titre de l’Article 81 paragraphe 1 du Traité, notamment en raison de sa portée limitée”.

¹¹⁰ *Ibid*, at paras 55 – 57.

CONCLUSION

1. THE APPLICATION OF EC LAW TO SPORT

- 1.1 Sport takes up an important part in the lives of many EU-citizens and fulfils a special social, cultural, educational and recreational function in European society. However, these socio-cultural characteristics do not prevent the application of EC law to professional sport, which constitutes an economic activity in the sense of Article 2 of the Treaty. The historic development of the European Union's relationship to sporting matters shows a new approach to sports policy, moving from a purely regulatory to a more socio-cultural angle. Thus, the Community has finally realised the special qualities of sport, recognising the need to take sporting interests into account when EC law is applied.
- 1.2 Sports governing bodies have a limited legal autonomy from Community intervention, based on the basic right of association. As a consequence, sports associations principally have the right to adopt the regulatory measures they consider to be in their sport's best interest. However, EC law may impose restrictions on the right of association, provided they are necessary for the protection of the rights and freedoms of others. Hence, in any case of a conflict between freedom of association and the free movement of workers and/or competition law, a balancing of rights is required. Having said that, even though the sports bodies' right of association has been rarely mentioned in existing case law under Articles 39(1) and 81(1), the fact that proportionate measures pursuing legitimate sporting interests are accepted seems generally sufficient to ensure adherence to this basic right.
- 1.3 In order to protect sporting interests efficiently and to be able to allocate funds for sports related programmes in the budget, a reference to sport should be included in the Treaty. Although the introduction of an article on sport in the Constitutional Treaty has to be welcomed, it does not provide adequate protection for sporting values, considering there is no obligation for Community institutions to pay attention to sporting interests.

2. FREE MOVEMENT OF PERSONS

2.1 In contrast to the approach adopted by the Court of First Instance in *Meca-Medina*, it is submitted that there is no room for a sporting exemption under Article 39(1). An exemption for restrictive rules based on their purely sporting objective, not only lacks support in previous case law, but would also set a dangerous precedent for other industries claiming to act in the public interest.

2.2 When assessing sporting rules under the provisions on the free movement of workers, different categories of sporting measures can be identified:

- The rules of the game such as the offside-rule, which *per se* do not have an economic dimension and therefore are not covered by the Treaty.
- Indistinctly applicable sporting measures that do not impede access to the employment market in another Member State and as such are not caught by Article 39(1) of the Treaty.
- Restrictive sporting measures which are accepted under Article 39(1) by reason of their sporting necessity such as selection rules for national teams.
- Restrictive sporting measures which are accepted under Article 39(1) under the justificatory test introduced in *Bosman*, i.e. because they pursue a legitimate sporting aim such as the encouragement of youth development or the proper functioning of sporting competition while adhering to the principle of proportionality.
- Restrictive sporting measures which are caught by the provision set out in Article 39(1), but may be justified under Article 39(3).
- Restrictive sporting measures which infringe Article 39(1) and may not be justified under Article 39(3).

2.3 Employed athletes such as football players originating from an “old” EU Member State or EFTA Member State enjoy the right to free movement pursuant to Article 39. Currently, sportsmen from the ten new EU Member States as well athletes from associated countries may not be discriminated against as regards to working conditions, but generally have no right to access the employment market in (other) Member States. Thus, while nationality restrictions do not apply to such players once they are legally employed in a

Member State, they may not invoke Article 39 to challenge transfer restrictions.

- 2.4 Article 39 does not apply to domestic transfer rules. Firstly, a transfer of a player within his Member State of origin constitutes a wholly internal situation and as such is not caught by Article 39. Secondly, EU-foreigners moving within another Member State cannot rely on Article 39, as domestic transfer rules are non-discriminatory and do not affect access to the employment market.

3. THE 1997 FIFA REGULATIONS UNDER ARTICLE 39

- 3.1 The 1997 transfer regulations constituted an obstacle to the free movement of football players, as they contained an absolute prohibition on players unilaterally terminating long-term contracts. Although the rules at issue were argued to follow the objectives of maintaining a competitive balance, encouraging youth development and securing a necessary stability of contracts – all goals which may be recognised as being legitimate under Article 39(1) – it is submitted that they could not have been justified under the *Bosman* “rule of reason”. Firstly, it is doubtful whether the 1997 transfer system did in fact enhance a sporting equilibrium or promote clubs’ investment in the training of young players. Secondly, while the 1997 transfer rules were undoubtedly suitable to guarantee that contracts were honoured, the burden put on players outweighed the clubs’ interest in contract stability.

4. EC COMPETITION LAW

- 4.1 Professional team sport is characterised by a special economic structure which distinguishes it from other business sectors. Firstly, the competitors need to co-operate in order to produce a marketable good. Secondly, consumers prefer closer to less balanced contests, which means that there is a requirement for a competitive balance between clubs; however, there is a dispute between economists as to which means are suitable to achieve this goal. Lastly, professional sports leagues constitute a “natural monopoly” which means that the forces of supply and demand only apply to a limited extent.

- 4.2 Despite the peculiar economics of sport, the Commission has rightly rejected the idea of a total exemption of the sports business from EC competition law. Still, there have been attempts to construe a “sporting exemption” for rules following a purely sporting objective; this approach has been taken up by the Court of First Instance in *Meca-Medina*.
- 4.3 In EC competition law, it is possible to identify a “rule of reason” approach which entails that restrictive practices may escape the prohibition set out in Article 81(1) if the distortion of competition is deemed to be necessary for the implementation of an agreement capable of encouraging competition, is not hardcore anti-competitive and fulfils the criteria of proportionality. However, until *Wouters*, the evaluation of restrictive agreements under the “rule of reason” was limited to economic considerations.
- 4.4 In *Wouters*, the Court opened up the “rule of reason” approach, holding a restrictive agreement to fall outside the scope of Article 81(1) under consideration of the public interest. Thus, parallel to the justificatory test adopted in *Bosman* under Article 39(1), *Wouters* provides a possibility to take account of sporting aims such as the promotion of youth development under Article 81(1) of the Treaty.
- 4.5 When the application of Article 81(1) to sporting rules is analysed, it emerges that similar to the categories identified under Article 39(1), it is possible to differentiate between the following kinds of sporting measures:
- Restrictive sporting rules not having the object of distorting competition which escape Article 81(1) by reason of their sporting necessity such as a measure prohibiting two clubs under common control to participate in the same competition.
 - Restrictive sporting measures which are accepted under Article 81(1) under the *Wouters* “rule of reason”, i.e. because they pursue a legitimate sporting aim such as the encouragement of youth development or the survival of smaller clubs while adhering to the principle of proportionality.
 - Restrictive sporting measures which are caught by the prohibition set out in Article 81(1), but may be justified under Article 81(3).

- Restrictive sporting measures which infringe Article 81(1) and may not be justified under Article 81(3).

5. THE 1997 FIFA REGULATIONS UNDER ARTICLE 81(1)

- 5.1** The fact that football players are workers and may thus not be classified as undertakings cannot prevent the application of Article 81(1). Moreover, a collective bargaining agreement between clubs' representatives and a players' union concerning the regulation of player transfers could not escape the scope of EC competition law.
- 5.2** Sports teams as well as national and international associations are undertakings and associations (of associations) of undertakings respectively in the sense of EC competition law. Considering that clubs, albeit having to co-operate with their competitors to a certain extent, are in principle operating independently on the market, sports leagues in Europe do not constitute a single entity to which Article 81(1) does not apply.
- 5.3** Football constitutes a market separate from other sports, which may be further divided into sub-markets according to the different avenues of marketing the product. The market for players constitutes a market in sources of supply, upstream of the market where the sporting good is produced. This market cannot be divided into sub-markets depending on players' market value or nationality; however, a separate market for goal-keepers may be identified. As regards the relevant geographical market, it is suggested that the market for football players is global.
- 5.4** The remaining transfer fees for out-of-contract players imposed by the 1997 Regulations restricted clubs in their competition to recruit players, constituting a sharing of sources of supply pursuant to Article 81(1)(c) of the Treaty. The rules at issue were not necessary for the functioning of sporting competition and distorted competition to an appreciable extent as well as affecting trade between Member States. Since the restriction could not be justified under Article 81(3), the requirement of transfer fees for certain out-of-contract players still in place after *Bosman* fell foul of Article 81(1).

5.5 The 1997 Regulations also restricted competition in the sense that players still in contract were not allowed to transfer without their current employer's consent and thus limited the choice of players available on the market. Also, even under consideration of the *Wouters* case law, the restriction would not have been justifiable, since the rules in question were not adequate or proportionate means to pursue the aims of promoting youth development and contract stability. Considering that competition between Member States was affected appreciably, the transfer restrictions imposed on players still under contract infringed Article 81(1).

6. THE 2001 AND 2005 FIFA REGULATIONS UNDER ARTICLE 39

- 6.1 The newly adopted transfer windows restrict free movement as they prevent players from taking up employment in another Member State outside the designated transfer periods. However, fixed transfer windows are an adequate and proportionate means to achieve the legitimate aim of ensuring a certain stability of team competition.
- 6.2 A requirement that minors may only move to another club within the EEA if suitable arrangements for their sporting and academic education are guaranteed constitutes an obstacle to free movement which can be justified by public interest considerations.
- 6.3 The requirement for training compensation payments for under 23 year olds impedes these players' free movement considerably. On the other hand, clubs should be rewarded for their investment in the training of young players, an aim which should be acknowledged under Article 39(1). Apart from the fact that there have been doubts over the suitability of training compensation to encourage youth development, the calculation scheme adopted under the 2001 and 2005 Regulations is open to criticism.
- 6.4 While the introduction of a maximum contract length of five years has to be welcomed, the requirement of a minimum contract length restricts players' movement to a certain extent. In contrast to the respective provision in the 2001 Regulations, the minimum contract length stated in the 2005 Regulations

is considered to be justified by the legitimate interest in a certain stability of teams.

- 6.5 The requirement to compensate clubs for breach of contract is not caught by Article 39(1), as objective criteria are applied to assess the financial disadvantage for clubs. Although the burden put on players by the imposition of sporting sanctions for breach of contracts weighs undoubtedly heavier, the adopted measures are justified by the interest in contract stability.

7. THE 2001 AND 2005 FIFA REGULATIONS UNDER ARTICLE 81

- 7.1 In principle, the distortion of competition between clubs on the player market imposed by transfer windows may be justified in order to guarantee a necessary stability of teams. However, there are concerns that the adopted measures put a disproportionate restraint on small clubs which do not have the means to sustain large squads to compensate for injuries.
- 7.2 Transfer restrictions for minors which require clubs to provide adequate sporting and academic education are justified in the light of *Wouters* under public interest considerations.
- 7.3 Training compensation payments for young players restrict competition between clubs in respect of a significant segment of the player market. In principle, such measures may be justified by sporting interests, given that the existing concerns over their suitability to promote youth development and the inadequacies regarding the calculation mechanism are removed.
- 7.4 A requirement providing for a minimum length of contracts evidently has a restrictive effect on competition. The distortion on competition is enhanced by the adoption of transfer windows, leading to a partial closure of the player market. As mainly small clubs are affected by such restrictions, it is suggested to allow exceptions for clubs hit by injuries.
- 7.5 Similar to the situation under Article 39(1), the requirement to compensate clubs for breach of contract is acceptable under Article 81(1) provided it is limited to actual financial disadvantage incurred by clubs. Obviously, the restriction imposed by sporting sanctions is more difficult to justify, but owing

to a certain need for contract stability in football, does not fall foul Article 81(1) if such measures are limited in duration.

8. FURTHER DEVELOPMENTS/LIMITATIONS OF THESIS

- 8.1 The recent discussions over non-solicitation rules or Charleroi's law suit for damages for their star striker's injury incurred during international duty show that the field of sport and EC law is still evolving. Since *Bosman*, players and clubs have realised that EC law provides them with effective weapons to break the sports bodies' regulatory monopoly and invoke their rights to free movement and under EC competition law. Whilst the juridification of the sports sector might be matter of regret for some, it should be kept in mind that it mainly is the result of the ongoing commercialisation of sport.
- 8.2 However, since the Community has signalled its willingness to accept certain sporting aims under the Treaty, it will be necessary for the sports bodies to identify the sporting interests and special characteristics that should be safeguarded and to indicate how they are best protected. In this context, economic research will be vital to analyse the economic impact of sporting rules. Such research is not only important to establish whether a certain measure actually achieves what it is set out to do, but also to demonstrate that there are no other less restrictive means available. For example, if it was proven that re-distribution measures are in fact unsuitable to achieve a sporting equilibrium, more restrictive means to achieve this legitimate objective might be permissible. Thus, although an assessment of a sporting rule under the Treaty generally requires an examination of its suitability to achieve a certain sporting aim as well as its proportionality, it must be emphasised that legal analysis is necessarily restricted to legal considerations and must rely on the economic research available. This signifies a considerable factor of uncertainty, since in many cases, as for example transfer rules, economists do not agree on the economic repercussions of a particular rule.
- 8.3 Apart from the fact that sports bodies will need to cooperate more closely with Community officials, they should also be prepared to defend existing restrictions in the field of amateur sport. Recent developments suggest that the

concept of a Union citizenship may also include the right to join and play for a certain amateur team and nationality restrictions will not be accepted. Moreover, it is doubtful whether transfer restrictions for amateurs are compatible with the principle of free movement. Although the issue of amateur sport in EC law is definitely worth closer examination, such an analysis lies outwith the scope of this thesis.

APPENDIX: CATEGORIES OF SPORTING RULES UNDER ARTICLES 39 AND 81 OF THE TREATY

1. Purely sporting rules which have no economic impact and which are outside the scope of the Treaty (so-called “rules of the game”, e.g. off-side rule)
2. Rules with an economic impact to which the Treaty in principal applies, but which fall outside the scope of the prohibitions set out in Articles 39(1) and 81(1):

ARTICLE 39(1)		ARTICLE 81(1)
<i>Discriminatory</i>	<i>Non-discriminatory</i>	
	1. Rules not affecting access to employment market in another Member State	1. Rules not having the object of distorting the market AND
	2. Rules affecting access employment market in another Member State AND	
Rules strictly necessary for functioning of sport (e.g. national teams)	2.1 are strictly necessary for functioning of sport	1.1 are strictly necessary for functioning of sport (e.g. anti-doping measures)
<i>“Conventional” Rule of Reason (“RoR”)</i>		
	2.2 ensure “proper” functioning of sport (e.g. transfer windows)	1.2 ensure “proper” functioning of sport (e.g. re-distribution measures)
	2.3 are necessary to achieve legitimate sporting aim (e.g. youth policy)	1.3 are necessary to achieve legitimate sporting aim (e.g. youth policy)
	<i>Bosman RoR</i>	<i>Wouters RoR</i>

3. Rules which are in breach of Article 39(1) or 81(1), but which fulfil the conditions for exemptions under Article 39(3) or 81(3) (e.g. collective selling of broadcasting rights)

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